

No. 14777

United States
Court of Appeals
for the Ninth Circuit

HENRY E. RUBELT, by Raymond Edward Ash-
by, his grandson and next friend,

Appellant,

vs.

D. O. BYBEE and W. A. BYBEE,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Southern Division

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellees.

In the United States District Court for the District of Idaho, Southern Division

No. 2994

HENRY E. RUBELT, by Raymond Edward Ashby, his grandson and next friend,
Plaintiff,

vs.

D. O. BYBEE and W. A. BYBEE,
Defendants.

COMPLAINT

(For cancellation of instruments and for damages)

I.

The plaintiff, Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, for his claim alleges:

II.

The plaintiff, Henry E. Rubelt, and Raymond Edward Ashby, his grandson and next friend, are citizens of the State of Idaho. The defendants, D. O. Bybee and W. A. Bybee are citizens of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

III.

On April 12, 1950, and at all times thereafter, the plaintiff, Henry E. Rubelt, is and has been an old man over eighty years of age, hard of hearing, partially blind, infirm in mind and body, and wholly

incompetent to transact and carry on his business affairs.

IV.

The plaintiff, Henry E. Rubelt, is now and at all times mentioned herein, has been the owner of the following described real property:

(a) Approximately 2500 acres of deeded land, to-wit:

Real property situate in the County of Owyhee, State of Idaho, and particularly described as follows:

The north half of the northeast quarter, the east half of the northwest quarter and the southeast quarter of Section 13; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of Section 25; and the southeast quarter of the southeast quarter of Section 26, all in Township 13 South, Range 1 East, Boise Meridian;

The east half of the southwest quarter, and Lots 3 and 4 of Section 18; the east half of the west half and Lots 1, 2 and 3 and the southwest quarter of the southeast quarter of Section 19; the west half of the northeast quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of Section 30, all in Township 13 South, Range 2 East, Boise Meridian;

The east half of the southeast quarter of Section 1, the east half of the east half of Section 12 and the east half of the northeast quarter of Section 13, all in Township 14, South, Range 1 East, Boise Meridian;

Lots 5, 6 and 7 of the Section 6; Lots 1, 3 and 4 and the east half of the southwest quarter of Section 7; the west half of the northwest quarter and the north half of the southwest quarter of Section 15; and Lots 1 and 2 and the east half of the northwest quarter of Section 18, all in Township 14 South, Range 2 East, Boise Meridian; and all other real property, if any, now owned by the lessor in Owyhee County, Idaho.

(b) Land Leases from the State of Idaho, to-wit:

Lease No.	Description	Acreage	Expiration Date	Yearly Rental
10347	All of Sec. 36, T. 11 S., R 4 W., Boise Meridian.....	640	12-31-53	\$ 57.60
11093	All of Sec. 36, T. 13 S., R. 1 W., Boise Meridian.....	640	12-31-54	44.80
8894- (14122)	All of Sec. 36, T. 13 S., R. 1 E., Boise Meridian	640	12-31-61	44.80
9562- (14756)	All of Sections 16 and 36, T. 14 S., R. 1 E., Boise Meridian	1286.11	12-31-62	90.03
Total Yearly Rental.....				\$237.23

V.

The said real property owned by plaintiff, Henry E. Rubelt, as aforesaid, is now and at all times mentioned herein has been operated as a cattle ranch. Located on said real property and there constructed by plaintiff are numerous out-buildings and a large stone ranch house. Also located on the property and there constructed by plaintiff are two large reservoirs for the storage of irrigation water, and over three-hundred acres of hay land is thus under irrigation, from which hay is and for many years

past has been grown and produced in an amount of over four-hundred tons yearly. Appurtenant to said real property was and is a Federal Grazing Right to graze 475 head of cattle and horses upon the public domain, and said grazing right was and is recognized by the Bureau of Land Management, United States Department of Interior, as being a Class I right.

VI.

On or about April 12, 1950, plaintiff, Henry E. Rubelt, was living on the above described real property and was by himself and alone attempting to operate the cattle ranch which it comprised; at such time and place the defendant, D. O. Bybee, acting for himself and on behalf of and as agent for the defendant, W. A. Bybee, came to plaintiff's ranch and there fraudulently induced plaintiff, Henry E. Rubelt, to agree to lease plaintiff's ranch to defendants, and thereafter, on or about April 15, 1950, defendant, D. O. Bybee, induced plaintiff to accompany him to the offices of an attorney of the defendants, and at the office of such attorney fraudulently induced plaintiff, Henry E. Rubelt, to execute a lease and option agreement, copy of which is attached to this complaint as Exhibit "A".

VII.

Thereafter, on or about December 1, 1950, defendants fraudulently induced plaintiff, Henry E. Rubelt, to enter into a written amendment to said lease, said amendment being in words and figures

as set forth in Exhibit "B" attached to and made a part of this complaint.

VIII.

When plaintiff, Henry E. Rubelt, entered into said agreements, he did not know the fair and reasonable market value of his property, nor did he know its fair rental value; he did not know the fair and reasonable market value of the Federal Grazing Right attached to and appurtenant to said real property, but in truth and in fact believed that it was worth nothing; because of his age and infirmities of mind and body, he was unable to ascertain the true value of his property.

IX.

The defendants, and each of them, were guilty of fraudulent and inequitable conduct in inducing the contracts of lease and option in the following particulars:

(a) The defendant, D. O. Bybee, acting for himself and for the defendant, W. A. Bybee, intending thereby to induce the execution by plaintiff of the agreements set forth herein as Exhibits "A" and "B", falsely represented to plaintiff that the ranch, the subject of the transaction, was worth no more than \$30,000.00 when in truth and in fact, as was well known to defendant, D. O. Bybee, the value of the said ranch was approximately \$150,000.00.

(b) The defendant, D. O. Bybee, knew of the aged and infirm condition of plaintiff, Henry E. Rubelt, knew that plaintiff was ignorant of the

fair and reasonable market value of his property, and knew that the information upon which plaintiff was basing his conception of values had reference to values and transfers twenty to thirty years prior to the date of this transfer, and especially prior to the enactment of the Taylor Grazing Act; notwithstanding such knowledge, defendant, D. O. Bybee, concealed from plaintiff the fact that the true value of the ranch was several times greater than the plaintiff thought it to be.

(c) At the time the plaintiff executed the agreements, herein Exhibits "A" and "B", plaintiff was alone and without the advice of counsel. When plaintiff requested time to consult an attorney regarding the agreement, herein Exhibit "A", he was informed by defendant, D. O. Bybee, by and through defendants' attorney, that the agreement was "all in your favor", and that he should sign it.

X.

The agreements herein set forth as Exhibits "A" and "B" are grossly unfair, inequitable and unconscionable, and are fraudulent in that they were by the defendant, D. O. Bybee, intentionally so worded and prepared as to be deceptive to a person of the age and infirmities of the plaintiff, Henry E. Rubelt, and the defendant, D. O. Bybee, did intend thereby to deceive plaintiff and to thereby induce him to execute said agreements, and as a result of said deception, plaintiff did execute the agreements. The particulars in which the agreements are decep-

tive, unfair, unconscionable, inequitable and fraudulent are as follows:

(a) The agreements purport to carry a rental of \$30,000.00 for a ten-year term, whereas in truth and in fact, as defendants well knew, the provisions therein require the plaintiff to pay the taxes and the state land lease rentals, amounting to approximately \$1,000.00 per annum, and thus reduce the actual rental to \$20,000.00 over the ten-year period.

(b) The agreements contain an option to purchase, with a purported purchase price of \$40,000.00, whereas in truth and in fact, as the defendants well knew, the amount to be realized both for rent and as payments toward the purchase price by the defendants could be as little as \$30,000.00 since the taxes and state land lease rentals to be paid by plaintiff during the period of the lease amount in the aggregate to the sum of \$10,000.00.

(c) The agreements contain an option to purchase with a purported purchase price of \$40,000.00 whereas in truth and in fact, as defendants well knew, at the end of the rental period the purchase price additional required to be paid was only \$10,000.00; at the time the agreements set forth in Exhibits "A" and "B" herein were entered into, the reasonable rental value of the premises for a ten-year term without an option to purchase was \$75,000.00, and the fair and reasonable market value of the premises on a sale wherein the first ten years' rental applies to the purchase price, was \$175,000.00.

XI.

That plaintiff, Henry E. Rubelt, did not and because of his infirmities could not read said agreements prior to signing them, nor were they read to him; he did not discover the fraud and deception that had been perpetrated upon him as aforesaid, nor did he discover the inequitable, unconscionable and unfair nature of the transaction until said agreements and the facts and circumstances surrounding their execution were presented to his attorneys in April of 1953.

XII.

The option provisions of the said agreements are entirely and wholly without consideration to plaintiff and are therefore void and without any force or effect whatever, either in law or in equity.

Wherefore, plaintiff, Henry E. Rubelt, by his grandson and next friend, Raymond Edward Ashby, prays for relief as follows:

(a) That the lease and option agreement, herein Exhibit "A", and the amendment thereto, herein Exhibit "B", be delivered up by defendants and the same be decreed by this court to be cancelled, annulled, void and rescinded.

(b) That defendants be ordered to forthwith deliver possession to plaintiff of the real and personal property described in Paragraph IV of this complaint and in Exhibit "A" herein, and to vacate the same.

(c) That plaintiff have judgment against defend-

ants, and each of them, in the amount of \$13,500.00, being the difference between the fair rental value of said premises for the year 1950, 1951 and 1952, and the amount received by plaintiff pursuant to said agreement.

(d) That plaintiff have such other and further relief as to the court may seem just and proper.

SMITH & EWING,

CARVER, McCLENAHAN &
GREENFIELD,

/s/ By GEORGE G. GREENFIELD,
Attorneys for Plaintiff

EXHIBIT "A"

LEASE AND OPTION

Parties: Henry E. Rubelt, a widower, Lessor, and
C. O. Bybee and W. A. Bybee, Lessees.

Subject: Owyhee County Ranch.

This Indenture of Lease, Made and entered into this 12th day of April, 1950, by and between Henry E. Rubelt, a widower, hereinafter designated as the lessor, and D. O. Bybee and W. A. Bybee, hereinafter designated as the Lessees;

Witnesseth: That for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the lessees, the lessor has leased and by these presents does lease, let and demise unto the said lessees the following described real and personal property, situate in the County

Exhibit "A"—(Continued)

of Owyhee, State of Idaho, and particularly described as follows:

The north half of the northeast quarter, the east half of the northwest quarter and the southeast quarter of Section 13; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter and the southwest quarter of Section 25; and the southeast quarter of the southeast quarter of Section 26, all in Township 13 South, Range 1 East, Boise Meridian;

The east half of the southwest quarter, and Lots 3 and 4 of Section 18; the east half of the west half and Lots 1, 2 and 3 and the southwest quarter of the southeast quarter of Section 19; the west half of the northeast quarter, the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter of Section 30, all in Township 13 South, Range 2 East, Boise Meridian;

The east half of the southeast quarter of Section 1, the east half of the east half of Section 12 and the east half of the northeast quarter of Section 13, all in Township 14 South, Range 1 East, Boise Meridian;

Lots 5, 6 and 7 of Section 6; Lots 1, 3 and 4 and the east half of the southwest quarter of Section 7; the west half of the northwest quarter and the north half of the southwest quarter of Section 15; and Lots 1 and 2 and the east half of the northwest quarter of Section 18, all in Township 14 South, Range 2 East, Boise Meridian; and all other real

Exhibit "A"—(Continued)

property, if any, now owned by the lessor in Owyhee County, Idaho.

All real property described in Land Leases Nos. 8894, 9562, 10347 and 11093, issued by the State of Idaho to the lessor, and hereby subleased to the lessees.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, including all water rights, ditch rights, reservoirs and reservoirs sites and including all grazing rights and privileges appurtenant to said land.

Personal Property, described as follows:

- 2 Hay-rakes;
- 2 Buck-rakes;
- 2 Derricks;
- 1 Eversman land leveler;
- 2 hand plows;
- 1 Three-section harrow;
- 2 Wagons, and two McCormick-Deering
mowers

To Have and to Hold the same unto the said lessees from the date hereof until the 1st day of April, 1960, subject to the terms and conditions of this lease; provided, however, that the lessor shall have thirty days from the date hereof within which to vacate his residence house on said premises.

In consideration of the premises the parties

Exhibit "A"—(Continued)

hereto have mutually agreed as follows:

1. Rent. The lessees shall pay as rent for said premises for said ten year term the sum of \$30,000.00, payable in annual installments of \$3,000.00 each. The first installment of \$3,000.00 has been paid coincident with the execution of this lease and the receipt of the same is hereby acknowledged by the lessor. The second installment of \$3,000.00 shall be paid on or before the 1st day of April, 1951, and a like installment of \$3,000.00 shall be paid on or before the 1st day of each and every year thereafter during the term of this lease.

2. Taxes and State Rentals. The lessor agrees to pay all taxes levied or assessed against said real property during the term of this lease and the lessor further agrees to pay the rentals falling due under said State Land Leases, and to renew said leases if the same expire during the term of this lease unless prevented from renewing the same because of circumstances beyond the control of the lessor.

3. No Assignment or Sublease. It is agreed that the lessees shall not assign this lease nor sublet any part of said premises or personal property without first obtaining the written consent of the lessor.

4. Right of Free Entry. The lessor or his agents, heirs or assigns, shall have and they are hereby granted the right of free entry upon said premises at any time during the term of this lease for the purpose of determining whether or not the conditions of this lease are being fulfilled.

Exhibit "A"—(Continued)

5. Care of Premises. The lessees agree to keep up and maintain in as good a state of repair as the same now are all buildings, stables, fences, machinery, reservoirs, ditches and other improvements on said premises and to return them upon expiration of this lease by lapse of time or otherwise in as good a condition as the same were at the time of the commencement of this lease, natural wear and tear from the ordinary use thereof excepted. All labor and materials for keeping up and maintaining said property shall be furnished at the sole expense of the lessees. Any part of said personal property lost or destroyed by the lessees shall be immediately replaced by the lessees with property of like kind and quality, title to which shall immediately vest in the lessor. Said personal property shall not be removed from the real property above described except upon the written consent of the lessor and shall be used by the lessees only in connection with their operations on the lessor's real property above described. The lessees agree that they will keep said premises and improvements and all other property hereby leased free and clear of all liens and encumbrances of every kind and nature whatsoever, save and except current taxes which shall be paid by the lessor. The lessees agree to take all reasonable precautions to prevent the growth or introduction of noxious weeds upon said premises and to destroy such weeds as are now present and the lessees further agree to perform all of their operations on the leased premises in a

Exhibit "A"—(Continued)

good and husbandlike manner and in accordance with the usual course of husbandry, having in mind the preservation of said property and premises in as good a condition as the same now are, natural wear and tear thereof excepted.

6. Abandonment. If the lessees shall vacate or abandon said premises without the consent of the lessor, his heirs or assigns, prior to the termination of this lease, the lessor may at his option re-lease said property and premises for such rent and upon such terms as the lessor may see fit, and if a sufficient sum shall not be realized, after paying the expenses of such reletting, to satisfy the rent hereby reserved, the lessees agree to pay and satisfy such deficiency upon demand.

7. Remedies Upon Default. If default be made in the payment of the rent above reserved, or any part thereof, or in the performance of any of the other terms and conditions hereof, to be kept and performed by the lessees the lessor, his heirs or assigns, shall first give the lessees thirty days' notice in writing, which said notice shall specify wherein the lessees have failed to comply with this agreement and which said notice shall be delivered to the lessees, or either of them, personally, or may be sent to either of them by registered mail addressed to them at Riddle, Idaho, which is hereby declared by the lessees to be their usual post office address for the purpose of this lease. If sent by mail, said notice shall be considered as served upon the lessees the date it is deposited in any United States Post

Exhibit "A"—(Continued)

Office enclosed in a sealed envelope with postage thereon duly prepaid and directed, registered and addressed to the lessees at the address above mentioned. If the lessees fail to correct such default within said thirty day period, the lessor, his heirs or assigns, may without further notice declare this lease terminated and re-enter and retake possession of said premises, with or without process of law, and may remove the lessees or any other person or persons occupying said premises and the lessees agree that in case of such default they will immediately deliver up peaceable possession of said premises to the lessor, his heirs or assigns, upon demand. The lessor, his heirs or assigns, may further, at their option and after notice as hereinbefore provided, for default of the lessees in performing any of the terms hereof, declare the whole amount of the rent hereby reserved, due and payable at once and proceed at once to recover the same, together with any damages which may be sustained by the lessor as the result of the lessees' failure to comply with the terms of this lease. The remedies herein mentioned shall be construed as cumulative and not as exclusive and shall not preclude the lessor from exercising any other right or remedy granted by law.

8. Option to Purchase. The lessors shall have and they are hereby granted the exclusive right, privilege and option to purchase all of the property and premises hereby leased, including all water rights, reservoirs and ditch rights, and including said

Exhibit "A"—(Continued)

State of Idaho Land Leases, for the sum of \$40,000.00, upon the terms and conditions as follows:

(a) This option shall be in full force and effect only for the last month of the term of this lease, being the month of March, 1960, and if the lessees fail to exercise said option during the month of March, 1960, this option shall be forfeited and shall be of no further force and effect.

(b) If the lessees elect to exercise this option, they shall notify the lessor, his heirs or assigns, in writing during the month of March, 1960, of their intention to exercise this option, and at the same time the lessees shall pay over and deliver to the lessor, his heirs or assigns, the sum of \$3,000.00 in cash, lawful money of the United States of America. All rent moneys theretofore paid under this lease, being the sum of \$30,000.00, shall be applied upon the option price, together with the sum of \$3,000.00 paid coincident with the exercise of said option, and the balance of \$7,000.00 shall be paid at the times and in amounts as follows:

The sum of \$3,000.00 on or before the 1st day of April, 1961, and the balance of \$4,000.00 on or before the 1st day of April, 1962.

(c) The deferred balance of said purchase price, being the said sum of \$7,000.00, shall bear interest from the date of said option is exercised until paid at the rate of three per cent per annum, and said interest shall be paid annually, coincident with the annual payment upon the purchase price.

(d) Taxes levied and assessed against said prop-

Exhibit "A"—(Continued)

erty for the year 1960 shall be pro-rated between the parties hereto as of the time said option is exercised and taxes for all subsequent years shall be paid by the lessees at the time the same become due and before the same go delinquent and if the lessees fail to pay said taxes herein agreed by them to be paid before the same go delinquent, the lessor, his heirs or assigns, may declare the lessees in default under the terms of this agreement, or may at their option make any payment deemed by them to be necessary to protect the title to the property herein sold, and any such payment made by the lessor shall be considered as a portion of the unpaid purchase price and shall draw interest at the rate of three per cent per annum from the date of payment until repaid by the lessees and the lessees agree to repay the same upon demand.

(e) All lease rentals falling due for said State of Idaho Land Leases subsequent to the date of the exercise of said option shall be paid by the lessees.

(f) Coincident with the exercise of said option, the lessor, his heirs or assigns, agree to place in escrow with the First Security Bank of Idaho, National Association, at Mountain Home, Idaho, a good and sufficient warranty deed executed by the lessor, his heirs or assigns, and conveying to the lessees the real property above described, together with bill of sale conveying to the lessees all of said personal property and together with assignments of all of said State of Idaho Land Leases then remaining in force and together with assignments of

Exhibit "A"—(Continued)

any easements on reservoir rights held by the lessor and together with an abstract or abstracts of title compiled by a legally bonded abstractor showing good and marketable title to said real property to be vested in the lessor, his heirs or assigns, or in lieu of said abstract or abstracts of title, title insurance written by a title insurance company authorized to do business within the State of Idaho, may be furnished. At the same time the parties hereto shall execute an escrow agreement with said bank and said bank shall be and it is hereby authorized and directed to deliver the said warranty deed, bill of sale and other instruments to the lessees upon their depositing in said bank to the credit of the lessor, his heirs or assigns, the deferred payment of purchase price above mentioned, together with interest at the times specified above, time being made the essence of said payments and of this agreement, and upon a compliance with the other terms and conditions hereof; otherwise, said warranty deed and other instruments shall be returned to the lessor, his heirs or assigns. An executed copy of this lease and option shall be deposited with said bank and shall be directions and instructions to it with reference to the terms and conditions of this agreement. All escrow charges of said bank shall be paid by the lessees and the lessor, his heirs or assigns, agree to affix to said warranty deed the necessary Federal Revenue stamps prior to the delivery thereof to the lessees, after payment of said purchase price with interest.

Exhibit "A"—(Continued)

(g) In the event this option to purchase is exercised, time is agreed to be of the essence of said payments of purchase price and of this agreement and full performance by the lessees of all their obligations hereunder is and shall be a condition precedent to their right to a conveyance hereunder. In the event the lessees fail to comply with any of the terms of this option to purchase, the lessor, his heirs or assigns or said escrow holder, shall first give the lessors thirty days' notice in writing specifying the lessees have failed to comply with this agreement and which said notice shall be delivered to the lessees or either of them, personally, or may be sent to either of them by registered mail, addressed to them at Riddle, Idaho, which is hereby declared by the lessees to be their usual post office address for the purpose of this agreement. Said notice may be served upon the lessees either by the lessor or by the escrow holder above mentioned. If the lessees fail to correct such default within said thirty day period, the lessor, his heirs or assigns, may at their option declare the whole unpaid balance of said purchase price, with interest, immediately due and payable and proceed at once to recover the same, or declare a forfeiture of all of the rights of the lessees under this agreement and of all of their interest in and to the real and personal property above described and the lessor, his heirs or assigns, may thereupon take immediate possession of said property, retaining all sums theretofore paid by the lessees for the use and occupation of

Exhibit "A"—(Continued)

said property during the time that possession of the same is retained by the lessees under this agreement, or bring an action in equity or at law for specific performance with damages.

9. Costs. In the event it becomes necessary for either of the parties hereto to enforce their rights hereunder by an action at law or otherwise, the defaulting party agrees to pay in such case a reasonable attorney's fee incurred by the party not in default hereunder.

10. No Oral Alterations. Strict compliance with all of the terms of this lease shall be considered as the essence hereof, and no change or modification shall be made in the terms hereof unless the same shall be reduced to writing and shall be signed by the parties hereto. Any extensions of time granted the lessees in the payment of any of the said rent or in the performance of any other term of this lease shall not constitute or be construed to be a waiver of the lessor's right to insist upon prompt payment of any other portion of said rent or strict performance of any other term of this agreement.

11. Covenant. The lessor agrees that the lessees performing the terms and conditions hereof shall peacefully and quietly have, hold and enjoy the said property and premises during the term hereof.

12. Heirs and Assigns. The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, executors and assigns of the respective parties hereto.

Exhibit "A"—(Continued)

In Witness Whereof, the said parties have hereunto set their hands the day and year in this agreement first above written.

HENRY E. RUBELT,

Lessor

D. O. BYBEE,

W. A. BYBEE,

Lessees

State of Idaho,
County of Elmore—ss.

On this 15th day of April, in the year 1950, before me, the undersigned, a Notary Public in and for the said State, personally appeared Henry E. Rubelt and D. O. Bybee, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

PERCE HALL,

Notary Public for Idaho, residing at Mountain Home, Idaho.

State of Oregon,
County of Malheur—ss.

On this 20th day of April, in the year 1950, before me, the undersigned, a Notary Public in and for said State, personally appeared W. A. Bybee,

Exhibit "A"—(Continued)

known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed by official seal the day and year in this certificate first above written.

HAROLD HENIGSON,
Notary Public for Oregon, residing at Nyssa, Oregon.

EXHIBIT "B"

Amendment Contract

Amendment contract, made and entered into this 1st day of December, 1950, by and between Henry E. Rubelt, a widower, hereinafter referred to as the Lessor, and D. O. Bybee and W. A. Bybee, hereinafter referred to as the Lessees, Witnesseth:

Whereas, upon the 12th day of April, 1950, the said Henry E. Rubelt, as lessor, made and entered into a Lease and Option Agreement in writing whereby he leased to the said D. O. Bybee and W. A. Bybee, as Lessees, certain real and personal property, situate in the County of Owyhee, State of Idaho, more particularly described in the said Lease and Option Agreement of April 12, 1950, to which reference is hereby made for a full and complete description of said property, and,

Whereas, the said property was leased to the said Lessees for a term commencing upon the date of said lease and ending upon the 1st day of April,

Exhibit "B"—(Continued)

1960, and said lease and option provided, among other things, that during the last month of the term of said lease the Lessees should have the right, privilege and option to purchase all of the property and premises thereby leased, and the parties hereto desire to amend said lease and option to provide that the Lessees should have the exclusive right, privilege and option to purchase all of said property and premises during the last five years of the term of said lease, now, therefore:

In consideration of the sum of One Dollar paid by the Lessees to the Lessor, and in consideration of the mutual covenants and agreements herein contained, it is hereby understood and agreed as follows:

1. That paragraph 8 of the said Lease and Option, dated April 12, 1950, between the parties hereto, shall be and the same is hereby amended to read as follows:

8. Option to Purchase. The Lessees shall have and they are hereby granted the exclusive right, privilege and option to purchase all of the property and premises hereby leased, including all water rights, reservoirs and ditch rights, and including said State of Idaho leases, for the sum of \$40,000.00, upon the terms and conditions as follows:

(a) This option shall be in full force and effect only during the last five years of the term of this lease, being the period from April 1, 1955, to April 1, 1960, and if the Lessees fail to exercise said option during said five year period, this option shall

Exhibit "B"—(Continued)

be forfeited and shall be of no further force or effect.

(b) If the Lessees elect to exercise this option, they shall notify the the Lessor, his heirs or assigns, in writing during the last five years of the term of said lease of their intention to exercise this option, and at the same time the Lessees shall pay over and deliver to the Lessor, his heirs or assigns, the sum of \$3,000.00 in cash, lawful money of the United States of America. All rent monies theretofore paid under this lease shall be applied upon the purchase price, together with the sum of \$3,000.00, paid coincident with the exercise of said option, and the balance of said purchase price (the total purchase price being \$40,000.00) shall be paid at the time and in amounts as follows:

The sum of \$3,000.00 on or before the 1st day of April immediately following the date of the exercise of said option and the sum of \$3,000.00 on or before the 1st day of April of each year thereafter until the 1st day of April, 1962, at which time the entire unpaid balance of said purchase price, with accrued interest shall be due and payable.

(c) The deferred balance of said purchase price shall bear interest from the date said option is exercised until paid at the rate of three percent per annum and said interest shall be paid annually, coincident with the annual payment upon the purchase price.

(d) Taxes levied and assessed against said property for the year in which said option is exercised

Exhibit "B"—(Continued)

shall be pro-rated between the parties hereto as of the time said option is exercised, and taxes for all subsequent years following the date said option is exercised shall be paid by the Lessees at the time the same become due and before the same go delinquent and if the Lessees fail to pay said taxes herein agreed by them to be paid before the same go delinquent, the Lessor, his heirs or assigns, may declare the Lessees in default under the terms of this agreement, or may at their option make any payment deemed by them to be necessary to protect the title to the property herein sold, and any such payment made by the Lessor, his heirs or assigns, shall be considered as a portion of the unpaid purchase price and shall draw interest at the rate of three percent per annum from the date of payment until repaid by the Lessees, and the Lessees agree to repay the same upon demand.

(e) All lease rentals falling due for said State of Idaho land leases subsequent to the date of the exercise of said option shall be paid by the Lessees.

2. That all other terms and conditions of said lease and option of April 12, 1950, executed between the parties hereto, shall remain in full force and effect without change or modification of any kind and more particularly paragraphs 8(f) and 8(g), shall remain in full force and effect without change or modification of any kind and this amendment shall hereafter be considered as a portion of the original contract as though originally incorporated therein and the terms and conditions of this

Exhibit "B"—(Continued)

amendment contract shall be subject to all of the rights, privileges, immunities and remedies specified in the original lease and option of April 12, 1950.

3. The granting of this extension of time for the exercise of said option shall not be construed as a waiver of any of the rights of the Lessor to insist upon strict and prompt performance of all of the terms and conditions of said Lease and Option, as amended by this Amendment Contract.

In witness whereof, the said parties have hereunto set their hands the day and year in this agreement first above written.

HENRY E. RUBELT,

Lessor

D. O. BYBEE,

W. A. BYBEE,

Lessees

State of Idaho,
County of Elmore—ss.

On this 13th day of December, in the year 1950, before me, the undersigned, a Notary Public in and for said State, personally appeared Henry E. Rubelt and D. O. Bybee, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand

Exhibit "B"—(Continued)

and affixed my official seal the day and year in this certificate first above written.

[Seal] PERCE HALL,
Notary Public for Idaho. Residing at Mountain
Home, Idaho.

State of Oregon,
County of Malheur—ss.

On this 21st day of December, in the year 1950, before me, the Undersigned, a Notary Public in and for said State, personally appeared W. A. Bybee, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] HAROLD HENIGSON,
Notary Public for Oregon. Residing at Nyssa, Ore-
gon. Commission expires 9/1/51.

[Endorsed]: Filed May 15, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant answer plaintiff's complaint as follows:

I.

Deny all of the allegations in said complaint con-

tained excepting only those hereinafter specifically admitted.

II.

Answering paragraph II of said complaint defendants admit that plaintiff Henry E. Rubelt and his next friend Raymond Edward Ashby are citizens of the State of Idaho and that defendant W. A. Bybee is a citizen of the State of Oregon. Deny that defendant D. O. Bybee is a citizen of the State of Oregon and affirmatively allege that defendant D. O. Bybee is a citizen of the State of Idaho and that by reason thereof the court has no jurisdiction in the premises. Further answering paragraph II of said complaint defendants deny that the matter in controversy exceeds exclusive of interest and costs the sum of Three Thousand Dollars (\$3,000.00) and affirmatively allege that the matter in controversy is an equitable one for cancellation of a written contract and that any claim of plaintiff for damages is wholly collateral to the issues in the case and sham, irrelevant and immaterial and that by reason thereof the court has no jurisdiction in the premises.

III.

Answering paragraph IV of said complaint defendants admit the allegations contained therein and affirmatively allege that the ownership of the plaintiff is subject to the rights of the defendants as contained in the lease and option agreements attached to plaintiff's complaint marked Exhibits A and B.

IV.

Answering paragraph V of said complaint defendants admit that there are numerous outbuildings and a large stone ranch house on said premises but allege that the outbuildings were at the time of the execution of Exhibit A in very poor condition; admit that there are two reservoirs on the premises but deny that the same are large; deny that there are over 300 acres of hay land under irrigation; deny that said land does now produce or for many years in the past has produced over 400 tons of hay per year; affirmatively allege that said land produces approximately 250 tons of hay per year; admit that appurtenant to said premises is a federal grazing permit to graze cattle and horses upon the public domain and affirmatively allege that such stock may graze upon the federal domain only portions of the year and denies that such permit is for 475 head of stock for the full period of use.

V.

Answering paragraph VI of said complaint deny the allegations therein contained and allege that plaintiff was at all times represented by legal counsel of his own choosing; that defendants were at no time represented by legal counsel and the contracts, Exhibit A and B, were prepared by plaintiff's counsel.

VI.

Deny the allegations contained in paragraphs III, VII, VIII, IX, X, XI and XII of said complaint.

For a further and separate defense defendants allege:

I.

That ever since the dates of execution of the instruments attached to plaintiff's complaint marked Exhibits A and B, plaintiff has known of the terms thereof but during the entire period of over three years until the commencement of this action, plaintiff did not assert any claim against defendants.

II.

That plaintiff has retained at all times the benefits of said contracts and all money received thereunder and has never returned or made any offer to return any part thereof; that defendants have since the execution of Exhibit A acted in good faith and reasonably relied upon said instrument and the amendment thereto, Exhibit B, and have substantially and materially altered their position in full reliance upon said instruments.

III.

That by reason of the premises the plaintiff is estopped by laches from asserting at this time the claims set forth in his complaint.

Wherefore, defendants pray that plaintiff take nothing by reason of his complaint and that they be recompensed for costs and disbursements incurred herein.

ANDERSON, KAUFMAN
and KISER

/s/ By EUGENE H. ANDERSON,
Attorneys for Defendants.

Acknowledgment of Service attached.

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on for trial before the court without a jury on the 8th day of February, 1955, the plaintiff Henry E. Rubelt appearing in person and by his attorneys Smith and Ewing and Carver, McClenahan and Greenfield, and the defendants appearing in person and by their attorneys Anderson, Kaufman and Anderson, and testimony having been offered by the plaintiff in support of his complaint and the plaintiff having rested his case, and defendants having moved the court for a judgment of dismissal on the grounds that the plaintiff, upon the facts and the law, had shown no right to relief as prayed for in his complaint, and the court having heard oral argument from opposing counsel relative to the motion and having considered the same and being advised fully in the premises, granted said motion, and plaintiff having thereafter filed a motion to reopen the case and submit further testimony relative to diversity of citizenship of the plaintiff and defendants and the court having granted said motion and the case having been reopened and there having been offered and admitted in evidence the deposition of defendant D. O. Bybee and defendants having thereafter renewed their motion for dismissal and the court having again granted said motion, now makes and

files its findings of fact and conclusions of law as follows:

Findings of Fact

I.

That plaintiff Henry E. Rubelt and Raymond Edward Ashby, his grandson and next friend, are citizens of the State of Idaho. That the evidence is insufficient to establish that the defendant D. O. Bybee is not a citizen of the State of Idaho.

II.

That the plaintiff Henry E. Rubelt is now, and on or about April 12, 1950, was, the owner of certain real property, approximating 2500 acres, situate in Owyhee County, Idaho, more particularly described in paragraph IV of plaintiff's complaint and plaintiff's Exhibit 1. That such property had situate thereon a stone house and several outbuildings, and had for years been operated as a cattle ranch and attached thereto and appurtenant to the land were Taylor Grazing Rights for 450 head of cattle and 25 horses for use of the public domain for portions of the year.

III.

That on or about April 12, 1950, the plaintiff and defendants entered into a lease and option agreement admitted in evidence as plaintiff's Exhibit 1, whereby the defendants leased from the plaintiff Henry E. Rubelt all of plaintiff's property together with the appurtenant Taylor Grazing Rights, for a term of ten years with option to purchase the property during the last month of the leased term. This

agreement was amended on or about December 1, 1950, by the instrument admitted in evidence as plaintiff's Exhibit 2, the substance of the amendment being to enable the defendants to exercise the option to purchase during the last five years of the leased term.

IV.

That at the time plaintiff and defendants entered into the original agreement on or about April 12, 1950, the plaintiff was over the age of 80 years and while he was somewhat hard of hearing, had failing eyesight and was somewhat forgetful in some matters, there is no evidence whatsoever that the plaintiff was mentally incapacitated or incompetent, or unable to manage or transact business affairs, nor is there any evidence to indicate whatsoever that the plaintiff did not know the extent and the value of his property and holdings.

V.

That there is no evidence to indicate whatsoever that there was any fraud on the part of the defendants or either of them in the negotiations for or the execution of, either the original agreement, plaintiff's Exhibit 1, or the amendment thereto, plaintiff's Exhibit 2.

Whereupon, the court concludes as a matter of law:

Conclusions of Law

I.

Upon the facts and the law the plaintiff has

shown no right to the relief prayed for in his complaint.

II.

That defendants have a judgment of dismissal for failure of the plaintiff to prove a right to relief prayed for in his complaint, both on the merits and for failure to prove jurisdiction of this court on diversity of citizenship of the parties.

Let judgment be entered accordingly.

Dated this 2nd day of March, 1955.

/s/ FRED M. TAYLOR,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1955.

In the United States District Court of the District
of Idaho, Southern Division

No. 2994

HENRY E. RUBELT, by Raymond Edward
Ashby, his grandson and next friend,
Plaintiff,

vs.

D. O. BYBEE and W. A. BYEE, Defendants.

JUDGMENT OF DISMISSAL

The above entitled cause came on duly for hearing before the undersigned, sitting as one of the judges of the District and Division aforesaid, on the 8th day of February, 1955, without a jury;

At the conclusion of the testimony adduced and presented by and on behalf of the plaintiff, counsel for defendants made a motion for judgment of dismissal upon the merits;

The court heard arguments of counsel in support of and against said motion and ordered the same granted. Thereafter plaintiff filed a motion to reopen the case and submit further testimony and evidence relative to the jurisdictional question of diversity of citizenship of the plaintiff and defendants.

Said motion came on for hearing on the 21st day of February, 1955, at the hour of 10:00 o'clock a.m. After hearing arguments of counsel in support of and against said motion, the court granted the same, whereupon further evidence was submitted by plaintiff in behalf of his complaint. Counsel for defendants again made a motion for judgment of dismissal upon the merits and the court having filed its findings of fact and conclusions of law,

It is hereby ordered, adjudged and decreed that said motion be, and the same is hereby, granted, and said action is hereby dismissed upon the merits and that defendants have and recover their costs herein expended.

Let be judgment be entered accordingly.

Dated this 2nd day of March, 1955.

By the Court,

FRED M. TAYLOR,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of Dismissal entered in this action on March 2, 1955.

CARVER, McCLENAHAN &
GREENFIELD

/s/ By GEORGE A. GREENFIELD,
Attorneys for Plaintiff Henry
E. Rubelt.

[Endorsed]: Filed March 18, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify the foregoing papers are that portion of the original files designated by the Appellee and as are necessary to the appeal under Rule 75 (RCP), to-wit:

1. Complaint.
2. Answer.
3. Transcript of Testimony.
4. Deposition of D. O. Bybee.
5. Findings of Fact and Conclusions of Law.
6. Judgment of Dismissal.
7. Notice of Appeal.
8. Designation of Contents of Record on Appeal.
9. Order Extending Time to Docket Appeal to May 24, 1955.
10. Order Extending Time to Docket Appeal to June 16, 1955.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of May, 1955.

[Seal]

ED. M. BRYAN,
Clerk

/s/ By LONA MAUSER,
Deputy.

In the United States District Court of the District
of Idaho, Southern Division

Civil No. 2994

HENRY E. RUBELT, by Raymond Edward
Ashby, his grandson and next friend,
Plaintiff,

vs.

D. O. BYBEE and W. A. BYBEE,
Defendants.

REPORTER'S TRANSCRIPT

Before the Honorable Fred M. Taylor, United
States District Judge, for the District of Idaho.

(Trial commenced February 8, 1955).

Appearances: For Plaintiff: George A. Greenfield, Attorney at Law, of Boise, Idaho, and Lawrence N. Smith, Attorney at Law, of Caldwell, Idaho. For Defendants: Eugene H. Anderson, Attorney at Law, of Boise, Idaho, and Samuel Kaufman, Jr., Attorney at Law, of Boise, Idaho.

February 8, 1955, 10:00 a.m.

The Court: Are you ready to proceed, gentlemen?

Mr. Greenfield: Yes, we are ready.

Mr. Anderson: We are ready.

The Court: Very well. Do you care to make an opening statement of any kind?

Mr. Smith: Yes, we have a short statement.

Mr. Greenfield: I wonder if as a preliminary matter we could get a stipulation from Mr. Anderson that Exhibits A and B, attached to plaintiff's complaint, being the two agreements here in issue are true copies duly executed by Mr. Rubelt?

Mr. Anderson: Do you have the original?

Mr. Greenfield: No.

Mr. Smith: We have a signed copy. The originals are in the bank.

Mr. Anderson: Why not put them in evidence.

Mr. Greenfield: Is it stipulated that they may be admitted?

Mr. Anderson: Yes, they may be admitted.

The Court: Plaintiff's Exhibits 1 and 2 may be admitted.

(Mr. Smith made opening statement.)

(Mr. Anderson made his opening statement.) [1*]

The Court: Call your first witness.

CLARA OCAMICA

having been first duly sworn, testified as follows,
upon

Direct Examination

By Mr. Greenfield:

Q. State your name?

A. Clara Ocamica.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Clara Ocamica.)

Q. You will have to talk loud enough so that the Court can hear you?

A. Yes, sir.

Q. Where do you reside?

A. I live at Bruneau, Idaho.

Q. How long have you resided at Bruneau?

A. About 21 years.

Q. How old are you? A. 55.

Q. Where were you born?

A. Tuscorora, Nevada.

Q. When did you come to Idaho?

A. When I was a little girl, two.

Q. Two? A. Yes.

Q. You are the daughter, are you not, of Henry Rubelt? A. I am.

Q. One of the parties to the contract here in dispute? [2]

A. I am.

Q. Were you raised on the old Henry Rubelt ranch, that is the property here in question?

A. I was.

Q. You lived there from the time you were two years old until when?

A. Until I was twenty.

Q. You were thoroughly familiar with the place?

A. I am.

Q. How much deeded land is involved on the old Rubelt place?

Mr. Anderson: Object on the ground the record speaks for itself.

(Testimony of Clara Ocamica.)

The Court: Objection sustained.

Q. Did you have a certain amount of land that you leased from the state? A. Yes, we did.

Q. How many acres are involved?

A. 2500.

Mr. Anderson: Object to that on the ground—

Q. (By the Court): You say 2500?

A. Yes.

The Court: It may stand.

Q. Is there a certain amount of meadow or hay land on this place? [3] A. Yes.

Q. How many acres of hay land on the place?

A. About 300.

Q. How much hay through the years year in and year out did you cut on that place? A. 350.

Q. 350 tons of hay a year? A. Yes.

Q. Mrs. Ocamica, there is in question here—one of the issues in the case is the amount of taxes and state land lease rentals that are involved every year. What are the yearly taxes on the place? Just let me ask you if you know what the taxes are; do you know? A. Yes, I know.

Q. How do you happen to know what the taxes are? A. Well, everybody pays taxes.

Q. Did you write the checks on them?

A. Yes.

Q. I ask you what the taxes are yearly on the Rubelt place?

Mr. Anderson: May I inquire?

The Court: Yes.

(Testimony of Clara Ocamica.)

Q. (By Mr. Anderson): Your father, Henry Rubelt, is here in the courtroom? A. Yes, sir.

Q. And he signs the checks for the taxes on his own land? A. He does.

Q. And he makes the payment of those taxes?

A. Yes.

Q. And made those payments back when he lived on the place at the time this contract was made?

A. That I——

Q. You didn't sign any checks back at that time?

A. (No answer.)

Q. You didn't sign any checks the year after the contract was made? A. Yes.

Q. When did you first sign a check for the taxes?

Mr. Greenfield: Never testified she signed the checks.

A. I don't remember.

Mr. Anderson: Object on the ground it is not the best evidence.

The Court: Objection sustained.

Mr. Greenfield: Your Honor, if Mrs. Ocamica makes out the checks and has personal knowledge of how much the taxes are——

The Court: In the first place, you had better tie it down as to time. [5]

Q. (By Mr. Greenfield): In 1950, 1951 and 1952, did you make out the checks for taxes?

A. I don't remember.

Q. Tell me what years you have made the checks out for the taxes?

(Testimony of Clara Ocamica.)

A. I made them out in the last three years that I know of.

Q. In the last three years, that would be 1952, 1953 and 1954? A. Yes.

Q. And you know what the taxes are for those years? A. I do.

Q. Now, I will ask you what the taxes are on the Rubelt place during the last three years?

Mr. Anderson: Objection to that—it is incompetent, irrelevant and immaterial, and not the best evidence.

Mr. Greenfield: May I be heard on that?

The Court: Yes.

Mr. Greenfield: One of the issues in this case, if the Court please, is the amount of state land lease rentals, and tax money involved, as it has a bearing upon the net amount of money that Mr. Rubelt realizes from this contract. It is very material to know how much money is involved. [6] The property taxes, if the witness were permitted to testify, would show that it has—that it is just about static amount every year. The witness also knows of her own knowledge the amount of the state land rentals which are always the same amount, and I feel it is most material and we would like to get the evidence in the record.

The Court: I am going to let her answer. I have some doubt about its materiality, but she may answer.

Q. (By Mr. Greenfield): How much are the taxes? A. Around \$570 for the land.

(Testimony of Clara Ocamica.)

Q. \$570 a year? A. Yes.

Q. And what are the state land lease rentals?

A. They are about \$237 and some cents. I don't know how many.

Q. The two together total in the neighborhood of \$800? A. Yes.

Q. Your father, Mr. Rubelt, was living on the ranch at the time that this contract was made in 1950? A. Yes.

Q. We would like to inquire into the condition of Mr. Rubelt's health just prior to and during that period; how old was he in 1950? [7]

A. Let's see—he is 86 now.

Q. So then in 1950 he would be 81?

A. Yes.

Q. What was the condition of his health with respect to his hearing ability at that time?

Mr. Anderson: Object on the ground that it is immaterial and not within the issues of this case.

The Court: She may answer.

A. He is awfully deaf, he can't hear very good.

Q. (By Mr. Greenfield): Was that the situation in 1950? A. Yes.

Q. What was the condition of his health with respect to his eyesight at that time?

A. He hasn't been able to read a paper for quite a few years.

Q. What was his general condition of health during that period?

(Testimony of Clara Ocamica.)

A. He was sick. My father has asthma, and he is sick a lot.

Q. Did he have a sick spell in the neighborhood of 1950, or either side of it?

A. Yes, he did, he had an operation.

Q. When was that? [8]

A. It was in 1949—it was in the fall of 1949, I think.

Q. And what was his condition and health following the operation?

A. He was very weak.

Q. What kind of a operation was it?

A. Varicose vein.

Q. Now in 1950, in the spring of 1950, when this contract was executed, tell the court what you experienced in your personal observations of your father regarding his mental condition?

Mr. Anderson: We object on the ground it is too general.

The Court: I think, Mr. Greenfield, you had better have the witness testify as to facts.

Q. (By Mr. Greenfield): Mrs. Ocamica, during the time when these contract—this first contract was negotiated in the spring of 1950, what can you tell the court regarding your father's ability to remember things?

Mr. Anderson: We object on the ground that that is incompetent, irrelevant and immaterial. No allegation of mental capacity.

The Court: She may answer.

(Testimony of Clara Ocamica.)

A. His memory isn't very good today and it wasn't good then. [9]

Q. What do you mean by his memory not being good, how do you know it wasn't good?

A. You could tell him the same story every day and two or three times a day and he never remembered it.

Q. What can you tell the court regarding his ability to recognize people that he had known for many years?

A. He couldn't recognize—couldn't recognize anybody, first he couldn't see them and then he just couldn't recognize anybody.

Q. Do you recall instances when people would come to your home and your father would be there and you would introduce them to him and he had known them for many years and wouldn't recognize them?

A. He wouldn't recognize them.

Q. Do you think of any particular instance of that?

A. Yes, he has known Mr. Harley's son for many years, and I would have to run out ahead and tell him who he was so he could talk to him like he knew him. I always do that.

Q. Did you have to do that in 1950?

A. Yes.

Q. In connection with this ranch, does the ranch have certain Federal Range rights?

A. It has.

(Testimony of Clara Ocamica.)

Q. What, if you know, is the extent of the Federal Range right on this ranch? [10]

Mr. Anderson: Object on the ground that is not the best evidence. Mrs. Ocamica is not the owner of this place. The owner is in the courtroom, Mr. Rubelt, and there is a record of those rights.

The Court: I am wondering why some of those records aren't here, or are they going to be.

Mr. Greenfield: We will have the Bureau of Land Management man and he knows the extent of the land right, and so does she.

The Court: She may testify if she knows.

Q. What is your rights on this place?

A. 450 cattle and 25 horses.

Q. Total of 475?

A. Yes, that is right.

Q. (By the Court): How many horses?

A. 25.

Q. (By Mr. Greenfield): Directing your attention to the spring of 1950, Mrs. Ocamica, do you recall a time when the defendant, Mr. D. O. Bybee, came to your place in Bruneau, did you have a conversation with him at that time or did he talk to you? A. No, he didn't. [11]

Q. What did he do when he got there?

A. Well, so many people drove in at that time, but my husband talked to him.

Q. You didn't talk to him at all?

A. No, I never seen him.

Q. Have you ever seen him? A. Yes.

Q. When did you first see Mr. Bybee?

(Testimony of Clara Ocamica.)

A. One time we had a dispute about taxes, and I don't remember who I wrote to, and he came.

Q. Well, what I am trying to get it, Mrs. Ocamica, do you have any personal knowledge of the negotiations of these contracts between Mr. Rubelt and Mr. Bybee?

A. You mean at that time?

Q. Yes. A. No.

Q. You weren't present during the negotiations?

A. No.

Q. Is there anything you can tell us regarding the general mental condition of Mr. Rubelt during the spring of 1950 that would reflect his ability or inability to transact business?

Mr. Anderson: We object on the ground the question is too general, and calls for a conclusion of the witness. [12]

The Court: Objection sustained.

Q. (By Mr. Greenfield): Mrs. Ocamica, can you say whether or not your father by 1950 had become childish in his ways? A. Yes.

Q. Now what do you mean by "childish"?

A. He never lives in our country. He will always go back to his childhood. All his talk is Germany, his childhood, when he was a young man growing up.

Q. And that was the condition he was in in 1950? A. Yes.

Q. You would say then he was living in the past? A. Yes.

(Testimony of Clara Ocamica.)

Q. Did he seem to take much interest in current things around him? A. No.

Q. Mrs. Ocamica, will you describe to his Honor the kind of buildings that you have there on the Rubelt place, what is the ranch house like?

A. It is three rooms downstairs, and two upstairs and it is about——

Q. What is it built of? A. Rock.

Q. Who built it? A. Mr. Rubelt. [13]

Q. Were you present when it was built?

A. I was.

Q. What outbuildings was there on the premises?

A. There is a big tool shed or a machine shed, and a garage, and a lot of little houses that they kept things in, like oil kegs, and there is a big barn and corrals.

Q. And all those were built by Mr. Rubelt and by the children? A. That is right.

Q. What reservoirs for the storage of irrigation water exist on the premises?

A. There is two.

Q. How large are they?

A. What do you mean how large?

Q. You don't know how large they are in acre feet or water storage? A. No, I don't.

Q. During the time you were present on the place were they large enough to store enough water to irrigate the hay land in the summer time?

A. They was.

Q. Did you have any shortage of water?

(Testimony of Clara Ocamica.)

A. No, not that I can think of.

Q. Were these reservoirs built at different times? A. Yes, they were. [14]

Q. When was what you referred to or what is referred to as the new reservoir built?

A. I don't know for sure, but it was built in the 30's.

Q. In the 30's? A. Yes.

Q. After the new reservoir was built there was always plenty of water? A. There was.

Q. When you turned this ranch over to the Bybees in 1950 what was the condition of the ranch generally?

Mr. Anderson: May I inquire in aid of an objection?

Mr. Greenfield: I will withdraw the question.

Q. In 1950 when this ranch was turned over to the Bybees what was the condition of the buildings on the place with reference to their state of repair?

Mr. Anderson: May I inquire in aid of an objection?

The Court: You may.

Q. (By Mr. Anderson): Were you there when the place was turned over to Mr. Bybee?

A. I was there off and on, yes.

Q. Were you there when it was turned over to Mr. Bybee? A. No, I wasn't. [15]

Q. How long had it been since you were there prior to that time?

A. I was there pretty near every year at one time or another.

(Testimony of Clara Ocamica.)

Q. When were you there in 1950?

A. I was there one time right after they put up the hay.

Q. Right after Bybees put up the hay?

A. Yes.

Q. What time of the year was that?

A. I can't remember. It was either in August or around there.

Q. Of 1950? A. Yes.

Mr. Anderson: We object on the ground no foundation has been laid.

The Court: Objection sustained.

Q. (By Mr. Greenfield): When were you on this place, Mrs. Ocamica, prior to Bybees taking it over?

A. I have been on it almost every year, or every year.

Q. And were you on it in 1950 before Bybees took it over? A. I don't remember. [16]

Q. Were you there in the summer of 1949?

A. Yes.

Q. Now can there—in the summer of 1949 what was the condition of the buildings and the house as to general state of repair?

Mr. Anderson: Object on the ground that is irrelevant. Mr. Rubelt is here in the courtroom and was there and can testify to the buildings.

Mr. Greenfield: If the woman knows the testimony is competent.

The Court: Your question is too general. Lot of

(Testimony of Clara Ocamica.)

things can happen to a building between the summer of 1949 and April, 1950. She may answer.

A. My father has always been a good rancher.

The Court: You had better answer the question.

Q. What was the general state of repair of the house and outbuildings in 1949?

A. I thought they was in good condition.

Q. Now, Mrs. Ocamica, have you seen the Rubelt place since Mr. Bybee took it over?

A. Yes.

Q. When did you last go out there?

A. I was out in 1950, and then I was out in one spring, but I don't remember. [17]

Q. See if you can think which spring that was?

A. (No answer.)

Q. All right, we will pass that. In 1949 will you state what the general condition of the fences were with respect to whether they were in good or bad condition?

Mr. Anderson: Object on the ground that that is irrelevant.

The Court: She may answer.

A. They were in good condition.

Q. With respect to the reservoirs in 1949, will you state whether or not they were in good repair and capable of storing water?

A. They were.

Q. Now, Mrs. Ocamica, from having lived in the Bruneau-Riddle area all your life, as you have testified, are you generally acquainted with land values in that part of the country?

A. Yes.

(Testimony of Clara Ocamica.)

Q. And are you generally acquainted with the value of grazing rights? A. Yes.

Mr. Anderson: Object on the ground that is irrelevant and incompetent.

The Court: Well, she may answer that.

A. Yes, I am. [18]

Q. Now from your general acquaintanceship with land values and the value of grazing rights in that part of the country as you have testified, and from your knowledge of the Rubelt place from having lived there a good part of your life, will you give your opinion to the court as to the value of the Rubelt property at the time it was sold to the Bybees?

Mr. Anderson: Object on the ground no proper foundation has been laid, and the evidence is incompetent.

The Court: Objection sustained.

Mr. Greenfield: May I discuss for a moment the question of qualification of a witness for this purpose?

The Court: Yes.

Mr. Greenfield: I would like to refer to Wigmore on Evidence, Volume 3, Section 714, in which Wigmore discusses the qualifications that a witness ought to have in order to—that her or his testimony may be admitted as to value, and in sub-paragraph 5 of Section 714 Wigmore states, “A sufficient qualification is usually declared to exist where the witness is a resident, land-owner, or farmer, in the neighborhood. The phrase differs in different juris-

(Testimony of Clara Ocamica.)

dictions and in [19] different rulings of the same Court; the notion is that of a person who has both an interest and an opportunity to make himself acquainted with land values around him may be permitted to testify." No qualification as a real estate expert is required. If the person is a local resident and land owner in the neighborhood and over a period of time testified he or she has become acquainted with the general land values in the neighborhood, the general rule as I understand it to be, as I think Wigmore states it to be, is that the witness is entitled to testify as to the value of property.

Mr. Anderson: I consider to be the ruling the only person whose business experience or work, or activity which goes to the fixing of values, and the observation of values on land is a competent witness to prove that, except of course that the owner may testify as to value, but that no other person may so testify, except those people who have experience which makes them skilled in determining value. Here this witness has not been qualified in any respect in those particular activities. If this witness can testify as to value, anybody who can read a newspaper can testify as to value.

The Court: I don't think a proper foundation has been laid of this witness, or this witness has [20] been qualified and the objection will be sustained.

Q. (By Mr. Greenfield): You and your son own a ranch near Bruneau? A. Yes, sir.

(Testimony of Clara Ocamica.)

Q. In past years have you had occasion yourself to purchase and sell ranch property?

A. We have.

Q. Are you acquainted with other sales of property that have been made in that area of property somewhere in character of the Rubelt place?

A. Yes.

Q. From your experience personally in the purchase and sale of ranch property in that area, and from your acquaintance with the purchase and sale of similar property in that area by others, do you have an opinion as to the value of the Rubelt property at the time of this transaction?

A. I have.

Q. I will ask you what is your opinion of the value of the Rubelt property in the spring of 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and the evidence is incompetent.

The Court: She may answer.

Mr. Anderson: May I inquire, your Honor.

The Court: Yes. [21]

Q. (By Mr. Anderson): Mrs. Rubelt, you are a housewife by occupation?

A. I am not Mrs. Rubelt.

Q. I mean Mrs. Ocamica, I am sorry. You were formerly Miss Rubelt? A. That is right.

Q. You are a housewife by occupation?

A. I am.

Q. And you live with your husband on a farm near Bruneau? A. I do.

(Testimony of Clara Ocamica.)

Q. Quite some distance from the ranch of your father out at Riddle; how far is it out there?

A. About 70 miles.

Q. About 70 miles from Bruneau to Riddle; is that right? A. I am not sure.

Q. What is it? A. I am not sure.

Q. Well, approximately? A. Yes.

Q. And how far is it from Riddle over to the ranch by the road, the ranch of your father?

A. About 12 or 15 miles.

Q. 12 to 15 miles.

A. Yes. [22]

Mr. Greenfield: Your Honor, I would like to object to this line of questioning on the ground it isn't in aid of an objection, it is general cross examination. The Court ruled the witness may testify. If Mr. Anderson wishes to attack the weight of her testimony by general cross examination he will have the opportunity.

Mr. Anderson: It goes to the area.

The Court: I assume you are trying to get at her acquaintance in the area. I think perhaps it goes more to the weight of her testimony, and I am going to give—to let her give her opinion in view of what she has said.

Mr. Anderson: I would like to continue my examination in aid of an objection, just a few questions.

The Court: Very well.

Q. (By Mr. Anderson): Now the ranch you

(Testimony of Clara Ocamica.)

have bought, you and your husband have bought at Bruneau, is the ranch *were* you reside?

A. It is what?

Q. Is the ranch *were* you reside, where you live?

A. Yeah.

Q. When did you buy that ranch where you live? A. In 1936, I think. [23]

Q. In 1936? A. Yes.

Q. And you bought only one ranch since that time; is that right? A. No.

Q. How many have you bought since that time?

A. (No answer.)

Q. Can't you answer that?

A. I don't know. I don't know how to answer that.

Q. Well, did you buy two? A. Yes.

Q. Two is the amount you bought; is that right?

A. I don't know what you mean.

Q. You say that you have bought ranches, the first ranch that you and your husband bought was the one at Bruneau? A. That is right.

Q. In 1936? A. That is right.

Q. Yes, and have you bought any other places since that time? A. Yes.

Q. Which ones?

A. We bought the "Sewell" place.

Q. Where is that?

A. At Hot Springs. [24]

Mr. Greenfield: I think this is going too far. The court ruled the witness may testify. Mr. Anderson

(Testimony of Clara Ocamica.)

will have ample opportunity to cross examine all day if he wants to.

Mr. Anderson: These questions go to the qualifications.

Mr. Greenfield: Question in aid of objection has already been ruled on.

The Court: Well, I think he is going to the qualifications. I don't know whether he is going to make another objection or not. You may continue. I wouldn't care to have it go on too long.

Q. (By Mr. Anderson): And that was grazing area that your husband and you bought?

A. Yes.

Q. Now what other place did you buy?

A. The Sewell place.

Q. That is the one you just testified to, isn't it?

A. No.

Q. Where is the other place at Hot Springs, when did you buy that?

A. That was Idaho Power, I don't remember the date.

Q. What? [25]

A. That was Idaho Power money.

Q. You don't recall when you bought that?

A. No.

Q. Now your husband of course handled those transactions, didn't he? A. I guess so.

Q. Your husband does the business in your family, doesn't he? A. I guess so.

Q. And he took care of the purchases of those particular places, didn't he?

(Testimony of Clara Ocamica.)

A. His lawyer did.

Q. His lawyer did, but he made the deal, didn't he?
A. Yes.

Q. You didn't make the deal, did you?

A. I helped.

Q. And that really is the extent of the knowledge that you have as to ranch transactions, isn't it?

A. I don't know what to answer on that. I think husband and wife always works together.

Q. Yes, no doubt about it, but what you told us has been the extent of your knowledge of the property, transactions or sales and purchases, isn't it?

A. I know as much as anybody about it, I guess.

Q. In other words, the knowledge you have is the general knowledge that everybody has in the community; is that right? [26]

A. That is right.

Q. No more, no less. A. (No answer.)

Mr. Anderson: We renew the objection.

The Court: I would like to ask the witness a question.

Q. (By the Court): Have you had anything to do with the sale and purchase of any other property other than the property you and your husband bought?
A. No.

Q. Do you know of any sales immediately prior to April 1950 in the area where your father's land is?
A. You mean do I know anybody—

Q. Any sale of land at that time immediately prior to or about that time, April, 1950; do you know of any?
A. (No answer.)

(Testimony of Clara Ocamica.)

Q. You remember when this transaction was made; do you not? A. Yes.

Q. Do you remember of any sale in that area at that time?

A. I don't know whether I do or not.

The Court: I think I will have to sustain the objection. This witness isn't qualified to know values of this land at that time. [27]

Mr. Greenfield: I would like to make an offer of proof for the record.

The Court: You may do so.

Mr. Greenfield: Comes now the plaintiff and offers to prove by this witness, Mrs. Ocamica, that if Mrs. Ocamica were permitted to testify she would testify that in her opinion the value of the Rubelt place at the time of the contract herein denominated Exhibit A, and entered into in 1950 in the spring, that the value of the Rubelt property at that time, fair market value, was approximately \$100,000.

Mr. Anderson: We object on the ground the witness is not qualified to testify as to that.

The Court: The objection will be sustained. We will take a ten minute recess.

(Whereupon, a recess was taken.)

After recess.

Cross Examination

Q. (By Mr. Anderson): I think you testified, Mrs. Ocamica, that you were the daughter of Henry Rubelt? A. I am; yes, sir.

(Testimony of Clara Ocamica.)

Q. And you have one brother?

A. I have. [28]

Q. Will you speak out so I can hear you?

A. I have.

Q. You have one brother, he is Henry Rubelt, Jr.?

A. That is right.

Q. And those are the only two children of your father?

A. That is right.

Q. Your brother, Henry Jr., and yourself?

A. Yes.

Q. And Edward Ashby is your son?

A. Yes, he is.

Q. You have two sons? A. I have.

Q. And their surname is Ashby?

A. Yes.

Q. Edward Ashby is now here as the plaintiff on behalf of Henry Rubelt?

A. It is Raymond Ashby.

Q. The name here is wrong, Edward is wrong?

A. Raymond is correct.

Q. Where is Raymond now?

A. In Tacoma, Washington.

Q. What is the name of your other son?

A. Jim.

Q. Where is Jim? A. In Lewiston.

Q. In Lewiston, Idaho? [29] A. Yes.

Q. You have one daughter? A. I have.

Q. What is her name?

A. Harriet Urquidi.

Q. And your husband's name is Eustaquio Ocamica?

A. Yes, sir.

(Testimony of Clara Ocamica.)

Q. And you live with him at Bruneau?

A. I do.

Q. You have been married for how many years?

A. 25.

Q. To Eustaquio Ocamica? A. Yes, sir.

Q. When did you move to Bruneau?

A. I moved when my daughter was one year old.

Q. How old is she now? A. 22.

Q. You have lived at Bruneau for 21 years?

A. I have.

Q. And prior to that time you lived out at Riddle? A. I did.

Q. Where did you live out at Riddle?

A. Lived at home and then I worked for Sewell.

Q. That is down at the Flying-H Ranch?

A. Yes.

Q. Now since you moved to Bruneau you have been only out [30] to Riddle occasionally?

A. Oh, yes.

Q. Prior to the time that the road was built over there did you go out every year?

A. Yes.

Q. Once a year you went out?

A. Oh, yes.

Q. And that was just for a visit with the old folks out there?

A. Well, I went often when mother lived.

Q. Your mother is not living; is that right?

A. No.

Q. She is dead? A. Yes.

(Testimony of Clara Ocamica.)

Q. When did she die, as near as you can recall?

A. In 1939.

Q. In 1939? A. Yes.

Q. And since that time you have been out there only occasionally? A. Yes.

Q. Now what were the nature of your visits, Mrs. Ocamica, did you go back the same day?

A. No, she would stay a day or two—I mean I would stay a day or two. [31]

Q. When you were there in 1949 how long did you stay? A. I don't remember.

Q. And where did you spend your time there, at the home there at the ranch?

A. Never stayed in the house.

Q. Where did you spend your time?

A. Running around about the ranch.

Q. With whom? A. My brother.

Q. Your brother? A. Yes.

Q. Henry Rubelt, Jr.? A. And my sons.

Q. Can you tell us how long you were there at that time?

A. Oh, I would stay over night lot of times, but I just—

Q. Now your brother was living there at that time? A. He was.

Q. He is married? A. He is.

Q. And was married then in 1949 when you were out there? A. Oh, yes.

Q. And had been married for many years before that? A. That is right.

Q. He has children of his own?

(Testimony of Clara Ocamica.)

A. He has. [32]

Q. They were living there with Henry Jr., and his wife and Henry Rubelt, your father?

A. Yes.

Q. Both your father and his son and his family lived there on the old home place; is that right?

A. That is right.

Q. Your brother owned the cattle out there, did he not? A. Yes.

Q. Your father didn't own any cattle?

A. I don't know whether he owned any or not.

Q. But your brother operated the cattle?

A. He did.

Q. And your father operated the ranch; is that right? A. Yes.

Q. And the cattle were run on the ranch?

A. Yes.

Q. And your father and your brother had an arrangement whereby your father got some of the proceeds of the cattle sales; isn't that right?

A. I don't know too much about his—his personal things.

Q. I see. Now your brother had bought a ranch up Juniper Mountain way? A. Yes.

Q. How far is that from the ranch of your father?

A. Oh, it is not too far when you go horseback.

Q. By the road how far is it? [33]

A. About forty miles.

Q. By horseback how far?

(Testimony of Clara Ocamica.)

A. Lot shorter, I wouldn't say.

Q. And when you were there in 1949 your brother was intending to move up to the ranch he bought; wasn't he?

A. I think so, I am not sure. I think so.

Q. You think he was? A. Yes.

Q. Now he lived there, however, on the ranch, the home ranch where your father lived, the ranch involved in this action, until after Mr. Bybee made his transaction with your father; didn't he?

A. Yes.

Q. And after Mr. Bybee made the transaction your brother then moved up to his place at Juniper Mountain; is that right? A. Yes.

Q. Is that right now? A. Yes.

Q. When was this farm house on the ranch built, Mrs. Ocamica?

A. We didn't build it all at one time.

Q. It was built part at a time? It has been built over many years, hasn't it? A. I think——

Q. Hasn't it been built for some years?

A. Just a minute, I can't think. In 1919 we finished it. [34]

Q. In 1919? A. Yes.

Q. When did you start it?

A. Oh, we built on it a little every summer when we had time.

Q. I see. That house is not modern, is it?

A. It is not.

Q. Not modern, by that I mean there is no running water in the house?

(Testimony of Clara Ocamica.)

A. There was running water.

Q. What kind? From a well, is it?

A. Yes.

Q. When was the running water put in; do you know?

A. I don't think I was home at that time, but there was running water.

Q. Now was there a lavatory in the house, or was the toilet outside?

A. No, it was outside.

Q. Was there a bathtub in the house, or do you just use other means to take a bath?

A. I think we all do that.

Q. Out in the country? A. Yes.

Q. In other words, the house is not modern by the ideas that folks have now? A. No.

Q. The home where you live now is modern; isn't it? [35] A. No, it is not modern.

Q. It is not modern? A. No.

Q. Now, of course you knew that your father had that place for sale there quite a long time; didn't you? A. Yes.

Q. Wanted to sell it because your brother was moving his cow outfit up to the Juniper Mountain place?

A. He didn't want to sell it, he wanted to lease it.

Q. You knew he had it on the market for sale; didn't you?

A. I never seen the ad, I wouldn't know.

(Testimony of Clara Ocamica.)

Q. There was an ad put in the paper; wasn't there?

A. Someone told me there was, yes.

Q. Do you know what paper that was in?

A. No, I don't. I don't take the paper.

Q. And you knew your father had put a price on the ranch for the sale of it?

A. No, I didn't.

Q. You didn't know that? A. No.

Q. But you did know he was eager to sell it?

A. When he wanted to lease it, that is all I know.

Q. That is all you knew about it?

A. Yes. [36]

Q. Now after he sold it, or made the transaction rather with Mr. Bybee, he continued to live out there, didn't he? A. Yes, he did.

Q. He lived there through the summer, fall of 1950? A. He did.

Q. Where did he live in the winter of 1950?

A. At my house.

Q. 1950 and 1951? A. Yes.

Q. That was the first time he had ever lived at your house? A. No.

Q. When did he live there prior to that time?

A. Since mother died he has been there almost every winter.

Q. Come in the winter and go back in the spring to the ranch? A. Yes.

Q. And then in the summer of 1951—spring of 1951, he went back out to the ranch too, didn't he?

(Testimony of Clara Ocamica.)

A. Yes, the fall.

Q. Did he stay there for quite some time the second season?

A. Just in the fall, I believe.

Q. Just in the fall? Are you sure you are not confused about that? A. Yes. [37]

Q. Now how long did he stay out there that year, the second year?

A. About three weeks.

Q. And at that time Mr. Bybee's employees were on the ranch out there; is that right?

A. That is right.

Q. And during the summer and fall of the year 1950 Mr. Bybee's employees were there at the ranch? A. In 1950?

Q. Yes. A. He was what?

Q. Mr. Bybee's workmen were there at the ranch, that is the people working for him?

A. There was one Indian there.

Q. Now your father looked after that ranch there, operated it for Mr. Bybee that first summer, didn't he?

A. He was there, I don't know what he did.

Q. You don't know? A. No.

Q. Now, Mrs. Ocamica, you were present at the time the deposition was taken of your father starting at ten in the morning on Thursday, November 5th, 1953, at Mr. Greenfield's office, weren't you?

Mr. Greenfield: Object to the question. It is wholly immaterial.

(Testimony of Clara Ocamica.)

The Court: She may answer. [38]

A. I was.

Q. And at that time, Mrs. Ocamica, questions were asked your father and he gave the answers?

A. Not very correct.

Q. Well, he gave answers, didn't he?

A. Yes, he answered.

Q. And you heard all the questions and answers, didn't you? A. I did.

Q. And you say they were not correct?

A. No.

Q. All right, I show you this, being the deposition taken at that time at Mr. Greenfield's office, and I read to you from it:

Question: "What is your age now, Mr. Rubelt?"

Answer: "Eighty-five."

That's correct, isn't it?

A. It was.

Mr. Greenfield: May I make an objection?

The Court: Just a minute, we will take a brief recess.

After recess.

Mr. Greenfield: Mr. Anderson is willing to interrupt his cross examination until we get rid of this one witness. [39]

The Court: Very well.

EDWARD D. SAVARIA

called as a witness, being first duly sworn, testified as follows, upon

(Testimony of Edward D. Savaria.)

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Edward D. Savaria.

Q. Where are you employed?

A. By the Bureau of Land Management.

Q. Here in Boise? A. Yes, sir.

Q. What branch of it?

A. That is with the District Grazing Office.

Q. In this office do you have charge of the grazing permits for cattle ranches and sheep ranches in this area? A. We do.

Q. Among the ranches over which you have jurisdiction is the old Henry Rubelt place down at Riddle one of them? A. That is correct.

Q. Have you examined the records of your office and can you state the extent of the range right on this ranch? A. Yes.

Mr. Anderson: Object on the ground it is not the best evidence. The record itself is the best evidence.

The Court: Well, he may answer.

Q. What was the range right?

A. The range right as shown in the record, 450 cattle from March 15th to September 30th; 300 cattle from October 1st to November 15th; 25 horses from March 16th to September 30th, and 25 horses from October 1st to March 15th, on this record here, of this succeeding year.

Q. How many animal unit months does that amount to? A. 3214.

Q. Perhaps for the clarification for the record you might explain how you arrive at animal unit

(Testimony of Edward D. Savaria.)

months, starting with a animal unit? What is a animal unit?

A. Animal unit is defined as a thousand pound cow, or equivalent thereof—5 sheep, 5 goats, or under a new rule half a horse.

Q. What is a animal unit month?

A. A animal unit month is the amount of forage consumed by one animal as defined in one month.

Q. This range right you testified to has what is denominated as graze 1 right?

A. Graze 1 right.

Cross Examination

Q. (By Mr. Anderson): In other words, it is a right for 450 cattle and 25 horses? [41]

Q. That is what it is generally known as?

A. Yes, sir.

(The witness was excused.)

MRS. OCAMICA

returned to the stand for further cross examination.

Q. (By Mr. Anderson): I think I misspoke myself when I said this was at Mr. Greenfield's office, that deposition of your father was at my office, wasn't it?

A. That is right.

Q. Mr. Greenfield was there?

A. That is right.

Q. And you were there?

A. That is right.

Q. And your father was there?

(Testimony of Clara Ocamica.)

A. That is right.

Q. And I was there, right? A. Yes.

Q. And the court reporter was there?

A. I guess so.

Q. Well, you remember that, don't you?

A. (No answer.)

Q. Now I notice that your daughter is in the courtroom? A. She is.

Q. And I notice you are looking down at her before you answer and she nods; are you getting indications from her as to what your answer ought to be?

A. No, I am capable of answering my own questions.

Q. Let's go into this record here. Now, Mr. Rubelt remembered his age all right, didn't he? [43]

A. Well, anybody remembers their age.

Q. Now next, was this not his testimony:

Question—"And when is your birthday?"

Answer—"The 3d day of May."

A. That is right.

Q. That is correct, isn't it? A. Yes.

Q. Question—"How long have you lived out at Riddle?"

Answer—"Since 1900."

You don't know whether that is correct or not?

A. No.

Q. Question—"When did you come to this country here?" Answer—"Here?"

Question—"Yes."

Answer—"Well, I came in 1900, in October, I

(Testimony of Clara Ocamica.)

was the first time here in Idaho." Is that correct?

A. That is before my time.

Q. Did your father not so testify?

Mr. Greenfield: I would like to renew my objection to this line of cross examination on the ground it is improper cross examination, irrelevant and incompetent, and doesn't tend to prove or disprove any issues in this case.

The Court: Objection overruled. This witness testified her father didn't have a very good memory.

Q. Question—"How old were you when you came to Idaho?"

Answer—"How old?"

Question—"Yes."

Answer—"Let's see,—thirty-two."

Did he not so testify? A. I guess so.

Q. Question—"And did you go directly to Riddle?"

Answer—"No, we bummed a while, before we located over there."

Question—"Where did you go when you first came to Idaho?"

Answer—"Not very far from there. We went up around Bruneau, further over towards the Three Creek country, around there. I don't know how if we was up any further than the Three Creek country. And then we went to Riddle, and I worked at Tuscarora, too."

Did your father not so testify?

A. Yes.

Q. His memory of that was all right?

(Testimony of Clara Ocamica.)

A. Yes.

Mr. Greenfield: I wish to have my objection as previously stated go to all these questions so I won't have to interrupt.

The Court: Very well, and the same ruling.

Q. I will continue with the deposition. [45]

Question—"Did you homestead the ranch out at Riddle?" Answer—"Yes."

Question—"Is that the ranch you leased to Mr. Bybee?" Answer—"Yes."

Question—"When did you homestead that?"

Answer—"It must have been 1901."

Question—"1901?" Answer—"Yes."

Question—"How many acres did you homestead there?" Answer—"160."

Question—"So you homesteaded there in 1901?"

Answer—"Yes."

Question—"And lived there from that time until you leased your place to Mr. Bybee?"

Answer—"Yes."

A. That is not right.

Q. He so testified, didn't he?

A. He testified, but it isn't true,—it is not correct.

Q. He did, did he not, live there?

A. He worked at the "Edgemont" mine for years.

Q. How long ago?

A. While I was a girl.

Q. Where was the mine?

A. My first school was at "Edgemont".

(Testimony of Clara Ocamica.)

Q. When did he homestead the place out there?

A. I wouldn't know. [46]

Q. Question—"How many acres did you lease to Mr. Bybee?"

Answer—"I don't exactly know, now; all that was there, of course."

Question—"All that you had?"

Answer—"Yes."

Question—"Mr. Rubelt, did you subsequently, up there, enter other public land, take up other public land, after you took up your first homestead?"

Answer—"Yes, I took a grazing——."

Question—"Grazing homestead?"

Answer—"Yes."

Question—"How many acres are in that?"

Answer—"640."

Did he not so testify?

A. Yes, he did.

Q. That is correct, isn't it?

A. Yes, I guess so.

Q. Question—"When did you take up that grazing homestead?"

Answer—"I don't remember, right now."

Question—"Approximately when?"

Answer—"What?"

Question—"About when?"

Answer—"I couldn't make that out."

Question—"Did you buy any land out there?"

Answer—"Yes, I bought the Weaver field." [47]

Q. That is correct, isn't it? A. Yes.

Q. His memory on that was all right, wasn't it?

(Testimony of Clara Ocamica.)

A. I guess so.

Q. Question—"And how large was that?"

Answer—"640."

Question—"And did you buy any other lands?"

Answer—"The Echechurri field."

That is correct?

A. I guess so.

Q. His memory was all right on that?

A. I don't know how much he bought.

Q. I will go back a little.

Question—"And did you buy any other lands?"

Answer—"The Echechurri field."

Question—"Who?"

Answer—"The Basque."

Question—"Raymond Echechurri?"

Answer—"Yes."

Question—"About when did you buy the field from Echechurri?"

Answer—"That is something I don't remember exactly, either.

Question—"About when was it?"

Answer—"No answer."

Question—"Did you have it for a long time before you leased it to Mr. Bybee?" [48]

Answer—"Oh, yes."

Question—"And you also had the Weaver field for a long time before you leased it to Mr. Bybee?"

Answer—"That was when them Basques had to get out of there with the sheep, wasn't it? Well, I can't make that out; I don't know."

Question—"How far is this ranch from Riddle?"

(Testimony of Clara Ocamica.)

Answer—"About seventeen miles, around the road."

Question—"That's the one road that you have to take to get there?"

Answer—"What?"

Question—"Is that the road that you have to take to get to the ranch?"

Answer—"Yes, you have to leave the highway there to get to my place—about seventeen miles."

Question—"Are there any other ranches adjacent or next to your ranch?"

Answer—"No."

Question—"How far is it to the next ranch out there?"

Answer—"I guess it's four miles—four or five miles. Mr. Sewell."

Question—"Is that Charlie Sewell?"

Answer—"Yes."

Question—"What is the name of that ranch? Is that the Flying H?" [49]

Answer—"Yes."

Question—"The Flying H ranch is closer to Riddle than your ranch?"

Answer—"What?"

Question—"The Flying H ranch is closer to Riddle than your ranch?"

Answer: "Yes, Riddle's there about two miles and a half, I think."

Question—"No, you are talking about the people, I think. Charlie Sewall's is closer to the place called Riddle than your ranch?"

(Testimony of Clara Ocamica.)

Answer—"Yes."

Question—"You had grazing rights with that ranch, didn't you?"

Answer—"Sure, it wouldn't be no good without."
He so testified, didn't he? A. Yes.

Q. His memory was all right there, wasn't it?

A. I guess so.

Q. Question—"No, that kind of a ranch is no good without grazing rights, is it?"

Answer—"No."

Question—"In other words, the ranch is used to put up hay for the cattle, and they range out on the public domain in the summer time?"

Answer—"Yes." [50]

Q. Question—"And you have some pasture in your fields, in the fall, do you not?"

Answer—"Yes."

Question—"How many cattle did you run out there?"

Answer—"Oh, it up and down, different years; sometimes we have thousand or more; and other times a few hundred; I guess steady there we have four or five or six hundred."

Question—"How many cattle did you have when you made the lease and option to Mr. Bybee?"

Answer—"I didn't have any."

Question—"When did you sell them?"

Answer—"I give them to Henry Rubelt, years ago."

(Testimony of Clara Ocamica.)

Question—"That's your son?"

Answer—"Yes."

Question—"And how long had it been since you had given the cattle to Henry?"

Answer—"Now?"

Question—"Yes?"

Answer—"Henry was eighteen years old. And how old is he? Forty-five?—or fifty?"

Did he not so testify?

A. I guess so.

Mr. Greenfield: Before you continue, may I add one objection to this. This deposition is a part of the record, apparently Mr. Anderson plans on reading it all. [51]

Mr. Anderson: I am cross-examining the witness.

Mr. Greenfield: I further object to it on the grounds it is a complete waste of time. It is in the record, and the Court has no doubt read the deposition.

The Court: Very well, but this is cross-examination, and she on being asked a question testified his answers were wrong. This is finding out what answers were wrong when the deposition was taken.

Q. (By Mr. Anderson): Question—"Henry had had the cattle ever since he was eighteen, then?"

Answer—"Yes."

Do you know whether or not that is correct?

A. I don't know anything about their personal things.

Q. Next question: Question—"And he had oper-

(Testimony of Clara Ocamica.)

ated and run the cattle ever since he was eighteen?"

Answer—"Uh, huh."

You don't know whether that is correct or not?

A. No.

Q. But do you remember your father so testifying?
A. Yes. [52]

Q. Question—"And you hadn't run any cattle, yourself, since he was eighteen?"

Answer—"No."

Question—"And he is about forty-five years old now?"
Answer—"Yes."

He so testified? A. Yes.

Q. You don't remember whether or not that is correct?
A. He is not 45, and not 50.

Q. Your father so testified? A. Yes.

Q. How old is he? A. 49 this year.

Q. 49 this year? A. Yes.

Q. And your father said 45 to 50 in November, 1953, at the time this deposition was made?

A. I don't know.

Q. Well, at the time the deposition was taken?

A. Yes.

Q. That I am examining on? A. Yes.

Q. Question—"He has another cattle ranch out in Owyhee County?"

Answer—"Yes, out in Juniper Mountains."

Q. That is correct, isn't it? [53]

A. Yes.

Q. And your father so testified?

A. Yes.

(Testimony of Clara Ocamica.)

Q. Question—"That's on the ranch he got from the Brace Brothers?" Answer—"Yes."

Question—"How far are they from your place?"

Answer—"They call it about forty miles, I guess."

Your father so testified? A. Yes.

Q. That is correct, isn't it? A. I guess so.

Q. Well, did he so testify? A. Yes.

Q. Question—"Forty miles north of your place?"

Answer—"No, it's northwest—it's really west."

Question—"But they are in Owyhee County?"

Answer—"Yes."

Question—"How long has he had those ranches,—approximately?" Answer—"About ten years."

Question—"He bought them, then, from Brace Brothers, about ten years ago?"

Answer—"Yes."

That is correct, isn't it?

A. Yes, the deposition—I don't know when he bought it. [54]

Q. But your father so testified? A. Yes.

Q. Question—"He bought them, then, from Brace Brothers, about ten years ago?"

Answer—"Yes."

Question—"And he has been operating the cattle over there in connection with those ranches for quite a while?" Answer—"No."

Question—"For how long?"

Answer—"He leased them out; he leased them to Johnson, and Johnson re-leased them again to that——"

Question—"Smeed?"

(Testimony of Clara Ocamica.)

Answer—"Yes, Smeed; that's right; and that was, let's see,—that must been ten years ago, too."

Your father so testified, didn't he?

A. Yes, he did.

Q. That is correct, isn't it? A. Yes.

Q. His testimony is correct, isn't it?

A. Not all of it.

Q. That I just read to you here, is that right?

A. Yes.

Q. Question—"And Henry continued to live with you down on your ranch after he bought the Brace place?" Answer—"About five years."

Question—"And then he moved up on the Juniper Mountain place?" [55] Answer—"Yes."

Question—"That was after he got married?"

Answer—"No, he didn't move until after Bybee took the place over."

Question—"And he lived there on your place with his wife until Bybee took the place over?"

Answer—"Yes."

Question—"Did he operate the ranch while he was there, or did you?"

Answer—"He worked the cattle and I ran the ranch." Your father so testified, didn't he?

A. Yes.

Q. It is correct, isn't it? A. Yes.

Q. His testimony is correct, isn't it?

A. I don't know whether it is correct, I wasn't—

Q. You were out there?

A. I was out there, but you know I didn't see what they did every day.

(Testimony of Clara Ocamica.)

Q. You didn't pay any attention to that?

A. No.

Q. Let's stay with this:

Question—"You sold him the hay from the ranch, to feed the cattle?"

Answer—"No, when the deal—when we made the deal he said he would give me half the beef money."

"Question—"The agreement was that Henry give you half the beef money, and he would use the home place to run the cattle?"

Answer—"Yes."

Question—"And he did that?"

Answer—"Yes."

Your father so testified, didn't he?

A. Yes, but that wasn't true?

Q. What isn't true about it?

A. Because my brother wouldn't sell the beef some years, and he would sell the young stock.

Q. Did he give your father half the money from the young stock too?

A. I don't know that.

Q. You don't know? A. No.

Q. You don't know whether he gave your father half the beef money or half from all the sales or not?

A. No, I don't know anything about their personal affairs.

Q. Question—"You have reservoirs with that place, to irrigate with?"

Answer—"Yes, two of them."

Question—"Where are those reservoirs?"

(Testimony of Clara Ocamica.)

Answer—"North of the place."

Question—"North of it?"

Answer—"Yes." [57]

Q. Your father so testified, didn't he?

A. Yes.

Q. And that is correct, isn't it?

A. Yes.

Q. That is the testimony is correct, isn't it?

A. I don't know much about this business.

Q. Well, just answer according to the truth or as near as you recall it.

Question—"Did you build those yourself, Mr. Rubelt?"

Answer—"Yes."

Question—"With a scraper and team of horses?"

Answer—"Yes, one of them. The next one has ten thousand yard, I guess, in it, the second one, when we rented it out to get it fixed up—to contractors here."

Question—"That was some years ago?"

Answer—"Yes, oh, yes. Fifteen or sixteen years ago." Did your father so testify?

A. Yes.

Q. Is his testimony correct?

A. I don't know.

Q. Question—"Does all the water from the irrigation of your ranches come from those reservoir (sic)?"

Answer—"Yes. As soon as the snow is off, there is no more water come; it has to be used out of the reservoirs."

Question—"In other words, the reservoirs catch

(Testimony of Clara Ocamica.)

the spring runoff, and that's used to irrigate the place during the [58] summer?"

Answer—"Yes."

Question—"How large are those reservoirs?"

Answer—"One of them hold a thousand acres of feet, and the other one holds about five hundred acres of feet."

Question—"One of them holds a thousand acre feet, and the other one five hundred acre feet?"

Answer—"No, about twelve hundred, the other one."

Question—"Let me get it clear, now: Is it a thousand and twelve hundred, or twelve hundred and five hundred?"

Answer—"The first one I built hold a thousand acres of feet, and the second one a little over a thousand."

"Question—"Those reservoirs were built with dirt dams?"

Answer—"Yes."

Your father so testified, did he not?

A. Yes, he did.

Q. And his testimony is correct?

A. I don't know.

Q. You don't know whether it is or not?

A. I don't know what you mean.

Q. Did your father make any misstatements there as to the truth of those matters?

A. I don't know whether he had the right—what do you do when you tell how many feet it is?

Q. You mean you don't understand acre feet?

A. No.

(Testimony of Clara Ocamica.)

Q. We will not bother with that. [59]

Question—"When you were running the ranch, who did you hire to put up the hay out there?"

Answer—"Oh, Indians, sometimes, and sometimes a man or two from the outside."

Question—"Oh, I see. You could get Indians from the Reservation?"

Answer—"Yes."

Question—"How far is your ranch from the Reservation?"

Answer—"Five miles and a half—to the Reservation ranch."

Question—"To the Reservation ranch, but a little farther down to the Reservation buildings at Owyhee?"

Answer—"Yes, ten or fifteen miles down there."

Did your father not so testify?

A. Yes, but it isn't so.

Q. What is incorrect about it?

A. The mileage.

Q. How far is it?

A. It is 17 miles around to the highway. It must have been to the Owyhee a little further.

Q. I see. You don't know whether he was talking about the road or talking about the distance straight through, do you?

A. No, distance straight through is more.

Q. How far is it? A. 20 or 30 miles. [60]

Q. Question—"What tribe of Indians lives at the Reservation?"

Answer—"Oh, most Piutes."

That is correct, isn't it?

(Testimony of Clara Ocamica.)

A. I don't know much about Piutes.

Q. You don't? A. No.

Q. But your father did so testify?

A. I don't think there is very many Piutes.

Q. Question—"Did Henry help put up the hay on the ranch when he was there?"

Answer—"Yes."

Question—"And you hired some men and some Indians to help?" Answer—"Yes."

Question—"Did Henry hire Indians for the cattle?" Answer—"Yes, once in a while."

Question—"He did most of the riding himself?"

Answer—"Yes."

Your father so testified, didn't he?

A. Yes.

Q. Is that testimony correct?

A. I don't know. You see, I don't know much about his riding and their cattle.

Q. You don't know whether it is correct or not?

A. No, I don't. [61]

Q. Question—"At the time you made the deal with Mr. Bybee to lease and sell that place, Henry was contemplating going up to his Juniper Mountain Place?"

Answer—"Yes, his time was up; he had to take them over."

Question—"Of course you had been trying to sell your ranch for quite a while, out there, hadn't you?"

Answer—"Yes. Of course, while Henry was there I didn't try to sell it; I didn't want to run him off."

(Testimony of Clara Ocamica.)

Question—"But when Henry was going to have to move, you decided to sell it?"

Answer—"He didn't want to. So I had to do something." Did your father not so testify?

A. Yes, but that wasn't so, I wrote the letters that he wanted to lease them.

Q. Was it true with respect to what he said about Henry? A. I don't know.

Q. You don't know? A. No.

Q. You say your father didn't want to sell, but he did testify he did want to, didn't he?

A. He wanted to lease it.

Q. The next question:

Question—"Did you offer to sell to Earl Riddle?"

Answer—"Yes, I did, once, but he didn't want it."

So your father did offer to sell; is that correct?

A. I don't know for sure, I don't know.

Q. Question—"Earl Riddle has his ranch out near the place called Riddle?"

Answer—"He is quite a ways from there."

Question—"How far is Riddle from Earl Riddle's ranch?"

Answer—"Earl Riddle and his boys, they just have one place there."

Question—"How far is that from your ranch?"

Answer—"Seventeen miles, eighteen, around the road; I guess straight through, it is closer."

Question—"How much did you offer to sell your ranch to Earl Riddle for?"

Answer—"Forty thousand."

Your father so testified, didn't he?

(Testimony of Clara Ocamica.)

A. Yes.

Q. Is that testimony correct?

A. I don't know whether he tried to sell it, I don't know.

Q. Next question: Question—"And he didn't want it?" Answer—"No."

Question—"Did you offer to sell it to a man in Twin Falls, that you recall?"

Answer—"Yes."

Question—"Who was that?"

Answer—"Oh, the sheep man; I don't know, I couldn't make out the name." [63]

I will continue:

Q. Question—"A Basque?"

Answer—"No, it was a white man—a sheep man."

Question—"That was about the time you made the deal with Bybee?"

Answer—"No, that was before."

Question—"That was before?"

Answer—"Yes."

Question—"How long before?"

Answer—"That fellow was over there in the winter; it must have been around two months or three months, I don't know."

Question—"What did you offer to sell the ranch to him for?" Answer—"Fifty thousand."

Question—"But he didn't want it?"

Answer—"Well, he wanted it, but he had sheep."

Question—"Oh, I see; and he couldn't run sheep there?" Answer—"No."

Did not your father so testify?

(Testimony of Clara Ocamica.)

A. Yes.

Q. Is his testimony correct?

A. You mean is that?

Q. Yes. A. I don't know.

Q. You don't know?

A. I don't know whether he tried to sell it. I don't know. I wrote the letters and he wanted to lease it. [64]

Q. Question—"Mrs. Eustaquia Ocamica is your daughter?" Answer—"Yes."

Question—"And she is here now?"

Answer—"Yes."

Question—"And Henry Rubelt is your son."

Answer—"Yes."

Question—"Those are the only children you have?" Answer—"Yes."

Question—"Mrs. Rubelt passed away some years ago?" Answer—"Yes, '39."

Did your father not so testify? A. Yes.

Q. And is his testimony correct? A. Yes.

Q. Question—"1939?"

Answer—"Yes."

Question—"Mrs. Rubelt, your wife, and yourself were living at the ranch at the time she passed away?" Answer—"No, Mountain Home."

Question—"Oh, did you take her to Mountain Home because she was ill?"

Answer—"To see the doctor."

Question—"How long was she there?"

Answer—"Oh, a month."

(Testimony of Clara Ocamica.)

Question—"Did you stay at Mountain Home during that time?" [65] Answer—"Yes."

Did your father not so testify? A. Yes.

Q. Is his testimony correct?

A. I guess so, I don't know. I don't know much about this.

Q. Question—"You know Mr. Hall, Perce Hall, the lawyer over there quite well?"

Answer—"Oh, yes—not quite well. I know him now."

Question—"He probated Mrs. Rubelt's estate, that it, he was your attorney in the probate of her estate?" Answer—"There was no estate."

Question—"Well, you had a probate proceeding in court, and you had Mr. Hall take care of that?"

Answer—"I don't know; I don't remember that."

Question—"And he has done other business for you from time to time, has he?"

Answer—"When we get the reservoir out to a contractor, the second one, to put it in shape, he was the attorney. And I made a will with him, too. That will is still there with Mr. Hall."

Question—"Mr. Hall made your will?"

Answer—"Yes."

Question—"That was before you made your deal with Mr. Bybee?" Answer—"Yes." [66]

Question—"And Mr. Hall made the contract——?"

Answer—"Yes."

Question—"——for the construction of the second reservoir?" Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And that was before your deal with Mr. Bybee." Answer—"Yes."

Question—"And you went to Mr. Hall to get the property straightened out, at the time Mrs. Rubelt died?" Answer—"Uh, huh."

Question—"So you know Mr. Hall fairly well?"
Answer—"No."

Question—"He had been your attorney, though, for quite some time?" Answer—"Yes."

Question—"Before you made your deal with Mr. Bybee?" Answer—"Yes."

Question—"And when you had any legal work done, you usually went in to see him at Mountain Home?"

Answer—"That was all I had to do with him."

Question—"I see."

Answer—"I didn't see him any other time, except just when I had something to do with him."

Did your father not so testify?

A. But it is not correct.

Q. Where is it incorrect?

A. Read that part over. [67]

Q. This last question I just read?

A. Yes.

Q. Question—"You know Mr. Hall, Perce Hall, the lawyer over there, quite well?"

Answer—"Oh, yes,—not quite well. I know him now."

Question—"He probated Mrs. Rubelt's estate, that is, he was your attorney in the probate of her estate?" Answer—"There was no estate."

(Testimony of Clara Ocamica.)

Is that correct? A. I don't know.

Q. Question—"Well, you had a probate proceeding in court, and you had Mr. Hall take care of that?"

Answer—"I don't know, I don't remember that."
Do you know whether or not that is correct?

A. I don't know.

Q. Question—"And he has done other business for you from time to time, has he?"

Answer—"When we get the reservoir out to a contractor, the second one, to put it in shape, he was the attorney. And I made a will with him, too. That will is still there with Mr. Hall."

A. Did he get a will there?

Q. Is it correct?

A. I don't know. Gene Anderson made the will.

Q. That was many years ago. Do you know whether or not Mr. Hall made a will for Mr. Rubelt?

A. I don't know whether he did or not. I know Mr. Anderson made a will in 1935; is that correct?

Q. That is correct. Do you know whether or not Mr. Hall made one or not subsequently?

A. No.

Q. Question—"Mr. Hall made your will?"

Answer—"Yes."

Question—"That was before you made your deal with Mr. Bybee?" Answer—"Yes."

Is that correct? A. I don't know.

Q. Question—"And Mr. Hall made the contract——?" Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"——for the construction of the second reservoir?" A. Answer—"Yes."

Is that correct? A. I don't know.

Q. And the next question: Question—"And that was before your deal with Mr. Bybee?"

Answer—"Yes."

Is that correct? A. I don't know.

Q. Question—"And you went to Mr. Hall to get the property [69] straightened out, at the time Mrs. Rubelt died?" Answer—"Uh, huh."

Is that correct? A. I don't know.

Q. Question—"So you know Mr. Hall fairly well?" Answer—"No."

Is that correct?

A. I don't know that either.

Q. Question — "He had been your attorney, though, for quite some time?"

Answer—"Yes."

Is that correct? A. I don't know.

Q. Question—"Before you made your deal with Mr. Bybee?" Answer—"Yes."

Is that correct? A. Is what correct?

Q. The statement that he had Mr. Hall as attorney for quite some time before the deal with Mr. Bybee and he answered "yes"; is that correct?

A. He was Bybee's and Mr. Rubelt's lawyer.

Q. You don't know anything about that, do you?

A. No.

Q. You don't know whether Mr. Hall ever saw Mr. Bybee before he came in the office with your father that day, do you? A. No. [70]

(Testimony of Clara Ocamica.)

Q. Question—"And when you had any legal work done, you usually went in to see him at Mountain Home?"

Answer—"That was all I had to do with him."

Question—"I see."

Answer—"I didn't see him any other time, except just when I had something to do with him."

Is that correct? A. I don't know.

Q. Your father so testified, didn't he?

A. Yes, but I don't know whether it is correct or not.

Q. Question—"You remember, of course, the day Mr. Bybee came out to see you?"

Answer—"The date?"

Question—"The day. You don't remember the date, of course, but you remember when he came there?" Answer—"Oh, yes."

Question—"You were there at home?"

Answer—"Yes."

Question—"And your daughter-in-law, Mrs. Henry Rubelt, was there?"

Answer—"Oh, yes, all of them."

Question—"With her youngsters. Was Henry there that day, do you know?"

Answer—"Uh, huh."

Did your father so testify?

A. Yes, but I don't know whether it is correct.

Q. You don't know whether that is correct or not? A. No.

Q. Question—"And what was the conversation you had with Mr. Bybee that day?"

(Testimony of Clara Ocamica.)

Answer—"Well, he wanted to see the place, and I went with him,—showed him the reservoirs and all."

Question—"Took him over the place?"

Answer—"Yes."

Question—"You wanted to sell it to him?"

Answer—"Uh, huh."

Question—"And you knew he wanted to buy it?"

Answer—"Yes."

Question—"And did you discuss a deal that day?"

Answer—"Yes."

Did your father not so testify? A. Yes.

Q. Is it correct? A. I don't know.

The Court: We will recess until two o'clock.

After recess, 2:00 p.m.

The Court: You may proceed.

Q. (By Mr. Anderson): Now I again show you the transcript of the testimony of Mr. Henry Rubelt, the plaintiff here, at the time of the deposition and show it to you and read you from the deposition. [72]

Question—"And did you discuss a deal that day?"

Answer—"Yes."

Question—"What was the discussion that day?"

Answer—"Oh, most of the discussion was promises by Mr. Bybee done. In the first place, I said I would like to stay on the place, and he said, 'Oh, yes, you stay on the place, you work here,' and he said that 'You stay on the place, even if you can't work any more.' And so it didn't look like I couldn't work and stay there, so I say, 'If I stay in the win-

(Testimony of Clara Ocamica.)

ter here, if I happen to stay in the winter here and don't work, I pay that tax.' So I did, and he said I will."

Question—"Do you remember the time he came out and you went to Mountain Home?"

Answer—"Not exactly."

Question—"You remember going to see Mr. Hall to have the contract made, don't you?"

Answer—"Yes. That must have been around the 10th."

Question—"Tenth of what month?"

Answer—"What is it? March? It must have been."

Question—"And Mr. Bybee and you went in at that time and talked to Mr. Hall?"

Answer—"Yes."

Now did Mr. Rubelt so testify at that deposition?

A. I guess so.

Q. You were there? A. Yes. [73]

Q. And are his answers there correct?

A. You mean if I know it was correct?

Q. Yes. Do you know whether or not it was correct? A. No, I wasn't there.

Q. Question—"Was there anybody else went with you?"

Answer—"No. I thought Mr. Hall was my lawyer, and if anything was wrong he would point it out to me."

Question—"You thought Mr. Hall was your lawyer?" Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And that's the reason you went to Mr. Hall?" Answer—"Yes."

Question—"And you talked to him about the kind of a deal you had made."

Answer—"He didn't talk loud enough; I couldn't understand lots of things."

Question—"I see. Is your hearing pretty good?"

Answer—"Not very good."

Question—"And how about your eyesight?"

Answer—"Not very good."

Question—"But you hear me all right?"

Answer—"Yes."

Question—"You think I talk louder than Mr. Hall?" Answer—"That's right."

Question—"But my tone of voice is not a loud tone of voice?"

Answer—"What is that?" [74]

Question—"But my tone of voice is not a loud tone of voice?"

Answer—"No, it is all right."

Did you hear Mr. Rubelt so testify?

A. Yes.

Q. Are his answers there correct?

A. Well, he could hear.

Q. Well, are his answers here correct? You heard me sitting across the table from him at the time of this deposition?

A. Yes.

Q. He didn't use a hearing aid that day?

A. No, but you talk different than anybody else.

Q. I talk louder?

(Testimony of Clara Ocamica.)

A. There isn't another man that I ever saw that can talk like you can.

Q. Now Mrs. Ocamica, you get me all excited here. A. How could I?

Q. Mrs. Ocamica, we were all in the office at the time this deposition was taken, weren't we?

A. Yes.

Q. And Mr. Rubelt was sitting there without a hearing aid; is that right? A. Yes.

Q. And I was talking in a lot louder tone of voice than I talk now? A. No. [75]

Q. What is your impression of this, about the same as I talk now?

A. Yes, but you can even make "Stackey" understand.

Q. That is your husband? A. Yes.

Q. Well, I always thought I could. But Mr. Rubelt heard all right at the time of this deposition, didn't he?

A. He heard you, yes, you have a nice voice to make you hear, yes.

Q. Now, continuing with the deposition, and I read to you:

Question—"Now you then went in to see Mr. Hall; you took Mr. Bybee there?"

Answer—"He went with me, yes; sure, he brought me there."

Question—"But you told him what lawyer to go to?" Answer—"Yes."

Question—"Because Mr. Hall was your lawyer?"

Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"And you went in to see Mr. Hall together?" Answer—"Yes."

Question—"And while you were there you told Mr. Hall the kind of a deal you had made with Mr. Bybee?"

Answer—"I don't know if we told everything; I don't think so."

Question—"Well, you talked to him about the deal, didn't you?" [76]

Answer—"Yes, but I didn't have the papers, and Mr. Hall had to go to Murphy to get it fixed up."

Question—"That's to get the description of the land?" Answer—"Yes."

Question—"And when you left Mr. Hall's office, where did you go?"

Answer—"That was late in the afternoon, so he took me and went to Nyssa that night, and stayed down there a couple of days; and I don't know if he got notice from Hall, but he took me to Mountain Home, and he dropped me in front of Mr. Hall's and he said to me, 'I have to hunt for my brother,' and pretty soon he come back."

Now did Mr. Rubelt so testify at the time of this deposition?

A. I don't think he knew where he went, did he?

Q. Well, did he testify. Were questions and answers given as I have read them here at the time?

A. Yes, I guess so.

Q. You were there, weren't you?

A. Yes, but——

(Testimony of Clara Ocamica.)

Q. Is that correct? Are the answers correct, or do you know?

A. He never knew where he went.

Q. You mean he never knew where he went from Mr. Hall's office? A. No.

Q. Where did he go?

A. I went to all the hotels and checked on them, and finally I went to Mr. Hall and I said to Mr. Hall, "Where did [77] Bybee go?" and he said, "Bybee took him to Nyssa."

Q. He testified he went to Nyssa?

A. Yes, I guess we talked it over but he didn't know.

Q. He didn't know when he talked to you but he knew at the time of the deposition?

A. Yes, I guess we checked on it by that time.

Q. Question—"And did you go back and talk to Mr. Hall?"

Answer—"No, he was busy; he had people waiting on."

Question—"You knew the girl he had there in the office, his secretary?"

Answer—"Yes."

Question—"She had lived out at Owyhee, Nevada, or Mountain City?"

Answer—"Was she in the office then? That was quite a while ago; maybe she was there. Yes, I know her husband."

Question—"When you went in with Mr. Bybee to see Mr. Hall the first time, you told Mr. Hall the

(Testimony of Clara Ocamica.)

kind of a deal you had made with Mr. Bybee, didn't you?"

Answer—"No, I don't know if we did. I guess we discussed it the second time we got in the office."

Question—"Oh, you discussed it then?"

Answer—"Yes."

Question—"With Mr. Hall?"

Answer—"Yes, he was there." [78]

Question—"And you told him the kind of a deal you had made?"

Answer—"Yes."

Question—"And you told him what to put in those papers?"

Answer—"Uh, huh. Oh, the papers was made."

Question—"Well, when did you tell him what to put in the papers?"

Answer—"Was it the first time we seen him? I don't think we say much."

Question—"But do you recall telling him at that time what to put in the papers? He couldn't draw papers unless you told him, could he?"

Answer—"Not much; I think the most of it was discussed when he made out them papers, the second time. And I tell Mr. Hall if he can't pay, I take the ranch back—I didn't know anything then about that stuff out of the sales yard. He told me he going to run cows and calves. And I says to Mr. Hall—Bybee was there—if he can't make me the payments, I take the ranch back. I didn't know

(Testimony of Clara Ocamica.)

nothing about that other that showed up. So we made that discussion the same day.”

Q. Do you recall whether or not Mr. Rubelt so testified at the time of this deposition?

A. I guess he did, I don't remember.

Q. Well, his answers are correct so far as you know, or do you know? A. I don't know. [79]

Q. I read to you from the deposition: Question—“You thought maybe Mr. Bybee couldn't make it on the ranch?”

Answer—“Well, he belly-ached always he didn't have this and he didn't have that, and he didn't have that, and finally I thought I will take it back.”

Q. Do you remember that question and answer?

A. No.

Q. You don't remember that at the time of the deposition? A. No.

Q. Do you know whether or not the answers are incorrect?

Mr. Greenfield: Your Honor, I appreciate perhaps Mr. Anderson is entitled to discover what part of this deposition Mrs. Ocamica feels Mr. Rubelt was mistaken. I don't think there is any point to his continuing to ask her if the reporter transcribed it correctly. We will concede Mr. Rubelt testified at the time of the deposition everything that is written down here, but constantly asking Mrs. Ocamica if he so testified—we will concede that.

Mr. Anderson: You concede that all that is being read from this deposition is correct?

(Testimony of Clara Ocamica.)

kind of a deal you had made with Mr. Bybee, didn't you?"

Answer—"No, I don't know if we did. I guess we discussed it the second time we got in the office."

Question—"Oh, you discussed it then?"

Answer—"Yes."

Question—"With Mr. Hall?"

Answer—"Yes, he was there." [78]

Question—"And you told him the kind of a deal you had made?"

Answer—"Yes."

Question—"And you told him what to put in those papers?"

Answer—"Uh, huh. Oh, the papers was made."

Question—"Well, when did you tell him what to put in the papers?"

Answer—"Was it the first time we seen him? I don't think we say much."

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(Testimony of Clara Ocamica.)

nothing about that other that showed up. So we made that discussion the same day.”

Q. Do you recall whether or not Mr. Rubelt so testified at the time of this deposition?

A. I guess he did, I don't remember.

Q. Well, his answers are correct so far as you know, or do you know? A. I don't know. [79]

Q. I read to you from the deposition: Question—“You thought maybe Mr. Bybee couldn't make it on the ranch?”

Answer—“Well, he belly-ached always he didn't have this and he didn't have that, and he didn't have that, and finally I thought I will take it back.”

Q. Do you remember that question and answer?

A. No.

Q. You don't remember that at the time of the deposition? A. No.

Q. Do you know whether or not the answers are incorrect?

Mr. Greenfield: Your Honor, I appreciate perhaps Mr. Anderson is entitled to discover what part of this deposition Mrs. Ocamica feels Mr. Rubelt was mistaken. I don't think there is any point to his continuing to ask her if the reporter transcribed it correctly. We will concede Mr. Rubelt testified at the time of the deposition everything that is written down here, but constantly asking Mrs. Ocamica if he so testified—we will concede that.

Mr. Anderson: You concede that all that is being read from this deposition is correct?

(Testimony of Clara Ocamica.)

Mr. Greenfield: I concede the reporter reported the answers of Mr. Rubelt correctly.

Mr. Anderson: Very well.

Q. (By Mr. Anderson): And I read from the deposition: [80]

Question—"That was the first time you went in?"

Answer—"No, second time."

Question—"The second time you went in?"

Answer—"Uh, huh. I didn't know nothing about that auction, what it is and how it works, till it was too late."

Question—"But you knew you had made a deal to lease and sell the place to Mr. Bybee?"

Answer: "Yes. He says, himself, 'If the time is up' and he wants it, could he buy it, and I says, 'Yes, if you pay for it enough, you can buy it.'"

Question—"And the price you put on it was \$3,000.00 a year?"

Answer—"Yes."

Question: "And you were to have the right to live out there?"

Answer—"That's what Mr. Bybee promised me, that I have the right to stay on the ranch as long as I wanted to."

Question—"Did you stay on the ranch for a while?"

Answer—"The first year."

Question—"Why did you move?"

Answer—"He had a hired boss there who told me to move. He said, 'You made that road, go on.' And then he told me several times to move soon."

(Testimony of Clara Ocamica.)

Question—"That was the man who was boss out there?" Answer—"Yes."

Question—"What was that man's name?"

Answer—"Oh, I don't know, either; I don't know; I never [81] asked him what his name was."

Question—"Did you ever talk to Mr. Bybee about going out there?" Answer—"Yes."

Question—"When was that?"

Answer—"The next year. But I had a letter he don't want me up there, so I have to stay home."

Question—"Who wrote the letter? Mr. Bybee?"

Answer—"The handwriting don't look like a man's handwriting; I think Mrs. Bybee wrote that letter. He said he want to save expenses, he don't want me up there."

Question—"Well, you stopped at his place, afterwards, down at Grandview?"

Answer—"We stopped there when we drove through, I think."

Question—"But did you live down at Grandview?" Answer—"No."

Question—"You have been living with Mr. and Mrs. Ocamica at Bruneau?"

Answer—"Yes."

Question—"That is your daughter and son-in-law?" Answer—"Yes."

Mr. Greenfield: For the purpose of the record in this case, I think it ought to be made very clear to Mrs. Ocamica that when Mr. Anderson asks if those answers are correct, he is talking about whether or not she knows personally as to the truth

(Testimony of Clara Ocamica.)

of the answers. I think she is saying, "I guess so," and at least part of the time with the idea that is what Mr. [82] Rubelt said at the time he testified.

The Witness: Yes, that is right.

Mr. Greenfield: Now Mr. Anderson is asking you whether or not these answers are true, that is the thing you ought to have in your mind, and if you don't know say so.

Q. (By Mr. Anderson): That is what I mean, were—whether or not you know if the answers are true?

A. Well, you see, I don't know. I was there at the deposition and you have it down, and you ask me and I don't know. I wasn't with my dad, he was all by himself.

Q. Then some of the times you knew they were correct, and sometimes you don't know?

A. I don't know anything at this point.

Q. Then, Mrs. Ocamica, if I am going too fast you slow me down here, and we will take it easy. I don't want you to be at all confused. Now going back to the question:

"Question—"You have been living with Mr. and Mrs. Ocamica at Bruneau?"

Answer—"Yes."

Question—"That's your daughter and son-in-law?"

Answer—"Yes."

Question—"That's ever since you left the ranch at Riddle?"

Answer—"Yes."

Now do you know whether or not those answers are correct?

A. He lives with me, yes. [83]

(Testimony of Clara Ocamica.)

Q. Question—"Do you help there on the ranch, with stacking?"

Answer—"Yes, whatever I could do. He kept me there for room and board."

That is with reference to the living at your place. Do you know whether or not those answers are correct?

A. No, I don't. He lives with us and that is all I know.

Q. He helps around the place, doesn't he?

A. Yes, a little. He works around there a little.

Q. Question—"Do you work there?"

Answer—"Yes."

Question—"What do you do, Mr. Rubelt. I am interested." Answer—"Most anything."

Question—"Mr. Rubelt, I think you are a rather remarkable man for your age. Are you able to get out in the fields yet?" Answer—"Yes."

The Witness: He don't now.

Q. He doesn't now but he did back when he first came to your place in 1951 or 1952?

A. No, he was sick in 1949 and 1950. He is lots better than he was, and he is asleep here now.

Q. He is here in the courtroom now?

A. Yes.

Q. That is the old gentleman sitting back there?

A. Yes, sir.

Q. I read to you from the deposition:

Question—"Do you do the chores around the place?" Answer—"Some of it." [84]

Question—"Do you stay pretty busy?"

(Testimony of Clara Ocamica.)

Answer—"Why, yes. There's always something to do on the ranch."

Are those answers correct?

A. My dad even sleeps in a heated room.

Q. I will read from the deposition:

Question—"And do you take care of your own business?"

Answer—"No, I can't see no more and I can't hear no more."

Question—"Do you write your own checks?"

Answer—"No. No, I sign them."

A. My father don't read nor write.

Q. Those answers are correct then?

A. Only thing he can do is write his name in United States—he can write in German but not United States, and he always had a German paper.

Q. But he does sign his name?

A. Yes, and he can't see the dotted line. He writes all over the check.

Q. Question—"Who do you have make your checks now?"

Answer—"Anybody I buy anything. My daughter, mostly."

Question—"You take care of your own bank account now?"

Answer—"So far as I can see."

Question—"You keep your bank account at Bruneau?"

Answer—"No, Mountain Home."

Are those answers correct?

A. Yes, he keeps his account at Mountain Home, there is no bank at Bruneau. [85]

(Testimony of Clara Ocamica.)

Q. Well, there was at the time of the deposition, wasn't there? A. Yes.

Q. There was back at the time of the transaction? That is the transaction involved in this case, wasn't there?

A. Yes, they bank in Mountain Home.

Q. Question—"In the First Security Bank there?"

Answer—"Yes, ever since I have any money in the bank that's at Mountain Home."

Question—"That for many years?"

Answer—"Yes."

Question—"Do you visit at Mountain Home very often?"

Answer—"Not when I don't really have to go down, I don't go down."

Are those answers correct? A. Yes.

Q. Question—"You just go over there on business?" Answer—"Yes."

Question—"How often do you think you go over there?"

Answer—"That isn't very often."

Are those answers correct?

A. I don't know what to say. He goes over there, he takes off every once in a while and goes.

Q. Question—"You don't do any business in the bank at Bruneau?" Answer—"No." [86]

Question—"Never have?"

Answer—"Never have—yes, I did, but I got—well, it's all right."

Question—"When was that?"

(Testimony of Clara Ocamica.)

Answer—"When that—what was his name what got in the pen in Bruneau?"

"Mr. Ocamica: Reynolds?"

"The Witness: In Bruneau. No, the other banker."

Then a question by me:

Question—"Golden?"

Answer—"Golden; you got it. I had a thousand dollars, and I didn't want to take the thousand dollars home with me, so I run in the Bruneau bank and I said, 'Here, put that in here,' and I said, 'How much interest you pay?' And he say four percent, and so I put it in the Bruneau bank. Years went by, so I thought I will go in and see about it, and he says is \$60.00, but there is no saving account in Bruneau, and that money didn't draw any interest."

Question—"It was just in your checking account?"

Answer—"Yes. So I took out the thousand dollars. So I didn't have no business with him no more." Are those answers correct?

A. I don't know.

Q. Question—"How long ago was that?"

Answer—"Oh, I guess ten or fifteen years, I guess. Golden." [87]

Q. "Now, what is your grandson's name, Ashby,—your grandson's name?"

Answer — "Oh, my nephew; that's Raymond Ashby."

Question—"He is your grandson?"

(Testimony of Clara Ocamica.)

Answer—"Yes."

Question—"He's in the army?"

Answer—"Yes."

Question—"He would like to have this place of yours?"

Answer—"He would like to work it with me. He says, 'Grandpa, if you get the place, I will help you fix it up again'."

Question—"And you and he will work the place together."

Answer—"Oh, sure, if we get it."

Question—"And this process of getting the place back for you is his idea?"

Answer—"Well, when I found out that this thing was wrong, I thought I would work it that way, and finally he showed up and says, 'I will help you'."

Question—"When did you find out it was wrong?"

Answer—"Oh, right away, so soon I came out and spoke about it to some of the fellows, he laughed about the deal I made."

Question—"That was right after you signed the papers?"

Answer—"Yes."

Question—"How soon after? Two or three days?"

Answer—"Everybody talking and laughing about it, right after—no, it was the next Sunday; no, it was the next week."

Question—"And who laughed about it?" [88]

Answer—"Oh, I don't know; everybody that was around there."

Question—"Around where? At Mountain Home?"

(Testimony of Clara Ocamica.)

Answer—"Yes, sure. I found out about that whole thing, then I heard lots of them afterwards, 'Why didn't you tell me. I took the place. I took the place'."

Question—"Did Riddle tell you that?"

Answer—"No, Riddle wasn't there; he was home. Riddle didn't want it."

Question—"I see. Who told you they would take it on the same deal?"

Answer—"I forgot about them; there was too many of them; it was in the Pastime they talked about it."

Question—"That's over at Bruneau, or Mountain Home?"

Answer—"Mountain Home."

Question—"You stayed in Mountain Home, then, for a few days after you signed the papers?"

Answer—"No, went back to Nyssa."

Question—"No, but did you stay in Mountain Home for a few days after you signed the papers?"

Answer—"No."

Question—"Where did you go?"

Answer—"I didn't go no place; I couldn't drive a car. I think Bybee took me."

Question—"He took you to Nyssa?"

Answer—"I think so." [89]

Question—"How long did you stay in Nyssa?"

Answer—"Few days."

Question—"And then you went back down to the ranch?"

Answer—"Yes."

Question—"And then you lived there for the rest of that year?"

(Testimony of Clara Ocamica.)

Answer—"Rest of that year, yes."

Question—"How much hay does that ranch produce every year, Mr. Rubelt?"

Answer—"Oh, four or five hundred ton, six hundred ton; some years it's over and some years it's down."

Question—"Hay is the main crop there?"

Answer—"Yes, and some years grain, too."

Question—"What kind of hay do you raise out there? Wild hay?"

Answer—"Timothy, and clover, and wild."

Question—"And you stack it out there, and feed it to the cattle in the winter time?"

Answer—"Yes."

Is this bothering you?

A. It is killing me.

Q. It is quite warm in here? A. Yes.

Q. Are those answers correct or do you know?

A. I would like a drink of water.

(Witness was given a glass of water.) [90]

The Court: I think for the purpose of interrogation what you are trying to find out is whether what part of this is incorrect—what part of the testimony is incorrect. It would be better if you stayed back a little.

Q. Do you remember the last answers that I read here just before you asked for a drink of water?

A. I don't know whether I do or not now.

Q. Well, let's continue with the deposition:

(Testimony of Clara Ocamica.)

Question—"And you stack it out there, and feed it to the cattle in the winter time?"

Answer—"Yes."

Question—"You have a lot of winter out there?"

Answer—"Oh, just like other places; it isn't any worse there."

Question—"Do you think it gets as cold at Bruneau as it does out there?"

Answer—"Yes, but Bruneau ain't got the snow we got."

Question—"How much snow do you have out there at the ranch?"

Answer—"It's up and down; sometimes there isn't hardly any, and other times there is lots of it."

Question—"About how deep is it out there at the ranch?"

Answer—"The last fifteen years, about three feet, I guess, on the average."

Question—"Does it drift pretty badly out there?"

Answer—"Over the rim rocks, yes." [91]

Question—"Do you have a lot of wind out there, in the winter time?"

Answer—"Plenty."

Question—"As a matter of fact, there is lots of wind out there, winter and summer, isn't there?"

Answer—"Yes, plenty of wind there."

Are those answers correct?

A. Yes, the wind blows out there.

Q. And quite a lot of snow out there?

A. Just like anywhere else.

Q. Question — "Do you remember when the

(Testimony of Clara Ocamica.)

change was made in this contract, in Mr. Hall's office?"

Answer—"No, not exactly."

Question—"Well, you remember going in with Mr. Bybee and having the option changed so that he could exercise it sooner?"

Answer—"Yes."

Question—"You were together at that time?"

Answer—"How?"

Question—"Mr. Bybee and you were together at that time, were you?"

Answer—"Oh, yes. Yes."

Question—"And you both talked to Mr. Hall about having that change made?"

Answer—"Yes, Bybee wanted it."

Question—"That was quite a while after the contract was first made, wasn't it?" [92]

Answer—"Yes, quite a while."

Question—"How long? Three years?"

Answer—"Yes, it must have been two or three years."

Question—"Mr. Bybee had been paying you the rent during all that time?"

Answer—"No, up and down he was; he shipped out the cattle——"

Question—"I don't think you understand. He paid you the rent every year?"

Answer—"Yes."

Those answers are correct, aren't they?

A. If you have got them written down, I guess so.

Q. I mean correct so far as the truth of them

(Testimony of Clara Ocamica.)

is concerned, as to whether or not the answers are correct?

A. I wasn't there. I really don't know, I wasn't with papa. There was nobody with him.

Q. Question—"And you took the rent until the last rent payment?" Answer—"Yes."

Question—"And you declined to take the last rent payment?" Answer—"Yes."

Question—"And he left the rent for you at Mr. Hall's office?" Answer—"Yes."

A. No, he didn't—one night he came way in the night and left a payment. We was all in bed, and he come way in the night and left a payment. Nobody heard it 'cept the hired man [93] heard that a man was there.

Q. He left a check? A. Yes.

Q. For the rent? A. Yes.

Q. And you don't think any was left at Mr. Hall's office?

A. I don't know. I know this one time he came and left way in the night.

Q. That was one of the rent installments?

A. Yes.

Q. Question—"Did you talk to Mr. Hall about it?"

Answer—"No, I didn't like it; the way Mr. Hall deal with me, I didn't talk to him any more."

Question—"But you felt friendly to Mr. Hall to the time you had the change made in the contract?"

Answer—"Yes."

Question—"Do you remember when Mr. Bybee

(Testimony of Clara Ocamica.)

came to you and wanted the right to sublease the ranch?"

Answer—"No. That must have been two — two years ago,—three years ago."

Question—"He came to you and wanted to sublease it?"

Answer—"Yes."

Question—"And you talked to Mr. Hall about it?"

Answer—"Yes, he was in the office; he took me over there."

Question—"And did Mr. Hall advise you against doing that?" [94]

Answer—"No, he never said nothing."

Question—"You decided not to let him sublease it?"

Answer—"No, that was in the contract, and my son, Henry, had trouble with his ranch, with Smeed, so I had enough of it."

Question—"You decided you didn't want Bybee subleasing it?"

Answer—"No, if I took the ranch back I could find out that they had burned up the fences, and everything."

Question—"That was over on Henry's ranch where that happened?"

Answer—"Yes. I didn't want it home; I had enough of it."

Question—"So that was the reason you decided not to let him sublease your ranch?"

Answer—"No, I knew the trouble Henry had."

Question—"The trouble Henry had on his ranch on Juniper Mountain?"

Answer—"Yes."

(Testimony of Clara Ocamica.)

Question—"When Mr. Bybee came out to see you and told you he was interested in buying, you told him you wanted forty thousand for it?"

Answer—"Yes, but he say he don't have; and if he don't have, he don't have, so I just dropped it. And he wanted thirty thousand, and was all ready to get out, and he finally hollered, "No, I will take it."

Question—"He said he would take it?" [95]

Answer—"Yes."

Question—"But he said he couldn't pay you the forty thousand, and you told him then that you would lease it to him?"

Answer—"Yes."

Question—"And you fixed the lease money at three thousand a year?"

Answer—"Yes."

Question—"You told him how much you wanted; is that right?"

Answer—"Yes, in connection with he promised me everything, and I told him, 'Well, if you will do that, I will not go too high on you.'"

Question—"And you told him he could credit the lease money on the purchase price, and buy it for forty thousand?"

Answer—"Yes,—how is that?"

Question—"You told him he could credit the lease money on the \$40,000.00, and buy it for the forty thousand?"

Answer—"That lease money had to come out of the principal."

Question—"Is that right?"

(Testimony of Clara Ocamica.)

Answer—"That's what I told him. And when his time was up, I will have to get the rest."

Question—"The rest of the forty thousand?"

Answer—"Yes."

Question—"The money he paid you as rent every year was to apply on the forty thousand?" [96]

Answer—"Yes, he said he don't have it; and if he don't have it, he don't have it, and I don't study very long about it; and I said, "Well, if you don't have it, I will lease it to you on this paying off every year on the principal."

Question—"You would lease it to him, and the lease money was to apply on the purchase price, every year?"

Answer—"Uh, huh, and you could throw up the lease any time you wanted to; but I don't think it was all written down."

Question—"As you understood it, he could throw up the lease any time he wanted to, but that wasn't in the papers?"

Answer—"No. There was lots of things not written down; I never seen it, anyway."

Question—"When the lease and option was drawn up in Mr. Hall's office, he read the contract to you, didn't he?"

Answer—"Yes, he suppose to, yes."

Question—"He read it and went through it section by section?"

Answer—"I suppose he did, yes."

Question—"Do you remember sitting there and him reading and explaining the contract to you?"

(Testimony of Clara Ocamica.)

Answer—"He read it, but explain it, he wasn't; he never mentioned anything that was written down."

Now do you know whether or not those answers are correct?

A. I don't know. I wasn't with my dad. There was nobody with him, just Mr. Bybee. [97]

The Court: If you don't know, all you have to say is you don't know. If you can't say whether it is correct or not you just say you don't know, that is all. A. Thank you.

Q. (By Mr. Anderson): There is one thing I would like to clear up; going back now to the residence house out there, that residence house has two rooms, doesn't it? Two rooms downstairs and three upstairs? A. Three downstairs.

Q. And three up? A. Two upstairs.

Q. Two upstairs? A. Yes.

Q. That residence house you said was built part—a part at a time? A. Yes.

Q. Do you mean part of the rooms were built and then later other rooms built? A. Yes.

Q. You think that progressed over a period from 1919? A. Yes.

Q. Now the barn out there, that has been built for many years? A. No, it is a new barn.

Q. How long has the barn been built?

A. I couldn't say for sure. [98]

Q. Now you said the operation in 1949 that your father had was for varicose veins? A. Yes.

Q. Where were the varicose veins?

(Testimony of Clara Ocamica.)

A. In his leg.

Q. In his leg? A. Yeah.

Q. One of his legs? A. Yes.

Q. You spoke of Mr. Bybee coming to your place at Bruneau before going out to talk to your father? He came there for the purpose of finding out if your father's ranch was for sale, didn't he?

A. I don't know, I never seen him.

Q. He talked to your husband, didn't he?

A. Yes.

Q. Your husband is not here in court? A. No.

Q. Your brother Henry and his wife are not here in court? A. No.

Mr. Anderson: I think that is all, your Honor.

Redirect Examination

Q. (By Mr. Greenfield): Is your brother Henry out on the ranch, or where is he?

A. He is out on the ranch, yes. [99]

Q. Is it possible to drive out there or are they snowed in?

A. I imagine they are snowed in. I don't know. I imagine they are snowed in.

Q. One other question: Based upon your observations of old Mr. Rubelt and he having lived with you in 1950, and the things you have testified to as to his hearing and eyesight and mental condition; is it your opinion that Mr. Rubelt was mentally and physically capable of transacting his own business at the time he made this contract?

Mr. Anderson: Object on the ground that is improper redirect, leading and suggestive.

(Testimony of Clara Ocamica.)

The Court: I think that is improper redirect, and further more, she has testified as to all the facts, and I think that is for the Court to conclude.

Mr. Greenfield: Very well.

Recross Examination

Q. You mean your brother is out at his ranch at Juniper Mountain?

A. I don't know where my brother is. [100]

HARRIET URQUIDI

called as a witness, having been first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): State your name, please? A. Harriet Urquidi.

Q. Where do you live? A. In Boise.

Q. What address?

A. 4914 Edson Street.

Q. What—how old are you?

A. I am 22 years old.

Q. Are you the granddaughter of Mr. Rubelt?

A. I am the granddaughter of Mr. Rubelt.

Q. And you are the daughter of Mrs. Ocamica?

A. Yes, I am.

Q. In 1950, Mrs. Urquidi, were you attending school? A. I was.

Q. Where? A. St. Teresa's Academy.

Q. Where did you spend your weekends?

A. I spent my weekends and vacations and holidays at home.

Q. By home you mean at Bruneau? A. Yes.

(Testimony of Harriet Urquidi.)

Q. When did you start school at St. Teresa's?

A. Started in the fall of 1946.

Q. So this situation of spending weekends and holidays and summers in Bruneau took place in 1946 and through 1950?

A. That is right.

Q. Now during the period that you were going to school at St. Teresa's and living at home over the weekends and holidays, was Mr. Rubelt himself present on those occasions staying with your mother?

A. Yes, he was during the winter.

Q. When did he start spending the winters at Bruneau?

A. Well, I think in 1948.

Q. When you would come home on weekends he would be there?

A. Yes.

Q. Do you recall when Mr. Rubelt became ill in 1949?

A. He had a varicose operation. I don't remember what winter it was, but I think it was around that time.

Q. Now drawing your attention to these two or three years just prior to and including 1950, let's say 1948, 1949 and '50; what can you say regarding Mr. Rubelt's physical condition by that time and in particular let's discuss first his ability to hear?

A. My grandfather had poor hearing, it was impaired.

Q. He had what?

A. He had impaired hearing.

Q. What do you recall from your years there at home and your being with him on weekends that

(Testimony of Harriet Urquidi.)

lead you to believe that he was hard of hearing at that time? [102]

A. You had to speak above normal and he liked to listen to the radio, especially to the news, and he had to have his ear awfully close to it.

Q. How loud would he have it tuned up?

A. Louder than a normal person would.

Q. And if there happened to be some noise or distraction in the house what would he do?

A. He would just get up and leave and go to the bunk house and set up the radio as high as he wanted it so he wouldn't be disturbed.

Q. With respect to Mr. Rubelt's eyesight, what do you recall about that, in 1950 what was his condition on his eyesight?

A. Well, as long as I have known my grandfather he has liked to read the paper, and by that time he couldn't even read it, and in 1949, I think, or fall of 1948, he went to buy me the typewriter and couldn't see the dotted line to write his name on the check.

Q. Do you recall when you graduated from St. Teresa's? A. Yes.

Q. Do you recall anything in connection with that graduation that would have a bearing on this eyesight problem?

A. Yes, I do. My grandfather paid for my graduation pictures and so naturally I brought them home, and when I showed him the pictures he couldn't see what it was. [103]

Q. Did he make any comment?

A. Yes, "Who is it?"

(Testimony of Harriet Urquidi.)

Q. Didn't even recognize you from your own picture? A. No, he didn't.

Q. Now around this period of 1950, particularly after his operation in 1949; what can you say as to whether or not Mr. Rubelt seemed to live in the past or not?

Mr. Anderson: Object on the ground it is immaterial.

Mr. Greenfield: It is quite material. One of the points in this case is whether this old gentleman was mentally alert and up to date to know the value of this property at the time he sold it or whether he was living 30 years in the past. Perhaps it is the most material point.

The Court: I think you should have the witness testify to the facts. I think when you are talking about living in the past, most people live in the past. Find out from the witness what he did. I have got to know the facts rather than conclusions.

Q. Was there anything that you observed regarding your grandfather during this period that would indicate that he was concentrating and thinking in terms of the past rather than being aware and alert to the present time—the time he is presently living in?

Mr. Anderson: Object, it calls for a conclusion.

The Court: You might ask what she observed. Ask about what he did and what he said.

Q. Go ahead and tell the court what he would like to know about that?

A. Well, is anyone came to the house my mother

(Testimony of Harriet Urquidi.)

had to run out in front and tell him who it was to save him from embarrassment. Most of them were life-long friends he had known, and he didn't even recognize them, and on an incident where this man had died and we told him about it, and we talked about it and days later he said he didn't know that man was dead, and it was nothing for grandfather to fall asleep during the meal.

Q. He fell asleep while eating?

A. Yes, he slept most of the time when he came back in 1950.

Q. This was 1950? A. Yes.

Q. It was during this period this transaction we are talking about took place?

A. Yes, and if we were talking about anything like world matters or anything, he would be in Germany, what he would do in Germany.

Q. Did he seem to have much interest about his present surroundings at that time and the things going on?

Mr. Anderson: Object on the ground that calls for a conclusion.

The Court: What was the question?

(Reporter read the pending question.) [105]

A. Will you repeat that again.

Q. Did Mr. Rubelt in 1950 from your conversations with him and your observations of his conduct, did he appear to have much interest in the things then around him, and things going on about him at that time? A. No, he did not.

Q. Where did his interest seem to center?

(Testimony of Harriet Urquidi.)

A. Germany.

Q. What did he talk about mostly?

A. He lived in the past—what he would liked to have seen done.

Q. What about Mr. Rubelt's ability to remember, or his memory during this period?

A. Grandfather had a poor memory.

Q. A poor memory? A. Yes.

Q. Tell a little more in detail what you saw or observed that would lead you to make that conclusion?

A. Well, like I told you about the man that died and he didn't even know he was dead.

Q. Go ahead.

A. We told him time and time again, and talked about it and all of a sudden he wouldn't be in the conversation, and he would say, "I didn't know he was dead, when did he die?" [106]

Cross Examination

Q. (By Mr. Kaufman): Your grandfather does not wear glasses, does he?

A. He is past that stage. I don't think it would do him any good to wear glasses.

Q. Has he ever tried?

A. Been to eye doctors several times.

Q. But has he ever worn glasses at all, and really made an effort to wear glasses?

A. I couldn't answer that.

Q. That you know of?

A. Not that I know of.

(Testimony of Harriet Urquidi.)

Q. Of course, he spent a great deal of his life, practically all of his life at least, out here in Idaho on the ranch out by Riddle, had he not?

A. Yes, we visited him frequently.

Q. And that ranch is where his interests were, were they not? A. I suppose.

Q. And after he had entered into this agreement with Mr. Bybee, and Mr. Bybee was running the ranch and he was living in town with your mother, his interests—his real interests were away from him, weren't they? He wasn't there at the ranch where he had been all his life?

A. He never used to tell me things like that when he came to visit us. [107]

Q. But before he came on visits did he—he had visited with your mother before?

A. Yes, he stayed with us during 1948.

Q. But during this period of time you were speaking about, around 1950, he was staying there more frequently than he ever had in the past, hadn't he?

A. He stayed lots of winters with us before that.

Q. But during that period or those periods, he still had the ranch that he could go back with—back out to after the winter was over? He had things to do out there, did he not?

A. I don't know.

Q. Well, he would go to the ranch?

A. He would go to the ranch. I don't know what he did.

(Testimony of Harriet Urquidi.)

Q. And after he entered into the agreement with Mr. Bybee he no longer had the ranch to occupy his interests, and there was really nothing around your mother's place that would occupy his interests; was there? A. He had us.

Q. Well, he had the family, yes, but he didn't have the work and so forth that he would have had normally if he still had his ranch?

A. I don't know what work he had at his ranch.

Q. You don't know what work he had at his ranch? A. Yes.

Q. Did you say he spoke of Germany?

A. Yes. [108]

Q. Recalled things in his youth?

A. Yes.

Q. And things that had transpired through the years, the war and I suppose things of that sort?

A. I don't know whether he was dreaming about them or not.

Q. Well, he discussed them?

A. Yes, he discussed them.

Q. Now with regard to not recalling something you had told him about a short time before; you figure he was forgetful of things?

A. Yes, definitely.

Q. Many of us are forgetful about things; aren't we?

A. Not things you talk about all the time, and just keep mentioning over and over again, and then you normally don't forget things among your friends.

(Testimony of Harriet Urquidi.)

Q. You heard Mr. Anderson read his testimony to your mother? A. Yes.

Q. His memory was quite clear at the time of the taking of that deposition way back when he first came to this country; wasn't it, and so forth?

A. I don't know anything about his personal affairs.

Mr. Kaufman: I believe that is all.

Mr. Greenfield: That is all.

(The witness was excused.)

The Court: We will take a short recess. [109]

After recess, 3:00 p.m.

The Court: You may proceed.

STEVE HOOKLAND

called as a witness, having been first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Steve Hookland.

Q. Where do you reside?

A. Oh, in Idaho and Nevada, around Mountain Home and Nevada.

Q. You are in Mountain Home now?

A. Yeah.

Q. How long have you lived around the Bru-neau, Riddle and Mountain Home area?

A. After—since about 1936.

Q. 1936? A. Yeah.

Q. Are you acquainted with Mr. Henry Rubelt?

(Testimony of Steve Hookland.)

A. Yes.

Q. How do you happen to be acquainted with him?

A. Well, I worked for him and his son.

Q. When did you first go to work for Mr. Henry Rubelt?

A. I think it was 1936 or 1937, I don't know which.

Q. How long did you work for him on that occasion?

A. About three or four months during hay.

Q. That is in the summer time? [110]

A. Yeah.

Q. What kind of work did you do?

A. Well, ranch work and hay, mostly hay then.

Q. That would then be in 1937?

A. Yeah.

Q. Did anyone else work with you in the hay?

A. Well, the first couple of years I was alone.

Q. But Mr. Rubelt himself and Henry, the boy, were there?

A. Yeah, and the two nephews.

Q. Who were they?

A. Raymond and Jim Ashby.

Q. Did you work for Mr. Rubelt any following 1937?

A. Yes.

Q. Up until when?

A. I think about 1940 was the last.

Q. 1940?

A. I wouldn't say for sure, but I think around 1940.

(Testimony of Steve Hookland.)

Q. Then you quit and didn't work for him for a while after that? A. Yeah.

Q. And then did you go back to work for him later? A. No.

Q. Did you work for him in 1944 and 1945?

A. Well, I don't remember the years, but the last time I worked for him Hank had three children.

Q. I didn't hear you. [111]

A. I don't remember the years it was, but the last time I worked for Hank he had three children.

Q. During the war or so?

A. Yeah, during the war.

Q. You were doing general ranch work?

A. Yeah. I worked in the winter through that year.

Q. Now during the years you have worked for him can you tell us how much hay was put up at the place that you had personal knowledge of each year?

A. Well, there was six or seven stack yard, and must have been about 50 ton to a stack yard.

Q. What would you estimate the average amount of hay yield in the Rubelt place to be during those years that you worked in the hay?

A. About 325 ton.

Q. When were you most recently on the Rubelt place? You have been on it since Mr. Bybee took it over? A. Yeah.

Q. About what year was that?

A. 1950 or 1951. I was there fishing at that time.

(Testimony of Steve Hookland.)

Q. Now did you have occasion at that time to notice the condition of the meadow land and the kind of hay crop he was——

Mr. Anderson: Object on the ground that is irrelevant and immaterial.

The Court: I don't see the materiality of it.

Mr. Greenfield: It may not be material at this time, perhaps I am anticipating a defense that they don't grow enough hay or as much hay as they used to. I will withdraw it.

Q. (By Mr. Greenfield): Was there a time, Mr. Hookland, in 1951 when you were working for Charlie Sewell? A. Yeah.

Q. Where is Charlie Sewell's place with respect to Mr. Rubelt's? A. Just east.

Q. Is it adjoining?

A. No, the land don't join. The cattle runs back and forth though.

Q. In 1951 while you were working for Mr. Sewell did you have occasion to stop and see Mr. Rubelt? A. Yes.

Q. Did you have occasion to see Mr. Rubelt from time to time?

A. Well, I was driving truck and did see him once in a while and I would stop over at Clara's and see him.

Q. By Clara you mean Mrs. Ocamica?

A. Yes.

Q. On these occasions when you would stop past and see him what can you tell us with reference to his mental capacity, and in particular with re-

(Testimony of Steve Hookland.)

spect to his memory? Was there anything you observed about him or was there any conversation you had [113] with him that would give you an opinion as to the state of his memory?

Mr. Anderson: We object on the ground it calls for a conclusion of the witness.

The Court: Yes, I think that is right, but I am wondering what difference it makes in 1951. This lease was entered into in 1950.

Mr. Greenfield: The amended contract was entered into later than 1951, and——

The Court: According to the pleadings it was entered into on December, 1950.

Mr. Greenfield: I am in error then. I am sorry. But it would seem to me that the proximity of six months to a year is close enough to be material.

The Court: The objection will be sustained.

Q. (By Mr. Greenfield): Do you recall having seen Mr. Rubelt in 1950? A. No, I don't.

Q. Were you working for Charlie Sewell in 1950?

A. No, working at the Spanish Ranch.

Q. Is that in Nevada? A. Yes.

Q. You didn't come back to Idaho until 1951?

A. When I worked for the Spanish Ranch I came down this way couple of times with the truck.

Q. Did you see Mr. Rubelt on this occasion?

A. I don't know whether I did or not. I stopped one time, but don't remember whether or not he was there.

Q. You remember 1951; those are the occasions you remember? A. Yes.

(Testimony of Steve Hookland.)

Cross Examination

Q. (By Mr. Anderson): You say you estimated the hay on the place at 6 to 7 stack yards with 50 tons in each stack yard? A. Yes.

Q. You didn't measure that hay? A. No.

Q. Just an estimate on your part?

A. Well, I measure a lot of hay at different times.

Q. I mean this hay, the hay of the Rubelt place; you didn't measure? A. No.

Redirect Examination

Q. (By Mr. Greenfield): You say you have measured lots of hay? A. Yeah.

Q. Have you put up lots of hay?

A. Yeah.

Q. Do you think you could measure or estimate the amount of hay in a stack pretty close?

A. I think so.

Q. Would you say you were stacking 325 tons of hay; you feel you are fairly accurate on that statement? A. Yes.

(Witness was excused.) [115]

ALBERT L. HARLEY

called as a witness, having been first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Albert L. Harley.

Q. Where do you live? A. Bruneau.

Q. How old are you? A. 71.

(Testimony of Albert L. Harley.)

Q. Now of those 71 years how many of them have you lived in the Bruneau area?

A. How many?

Q. How long?

A. Must be 70 years and a few months.

Q. So you went to live in Bruneau when you were just a few months old, and you lived there ever since? A. That is right.

Q. Do you own a ranch out on those parts?

A. Near Bruneau?

Q. Yes. A. Yes.

Q. Is that in Little Valley?

A. Little Valley, yes.

Q. What kind of a ranch is that, Mr. Harley?

A. Just a stock ranch.

Q. It is a general stock ranch?

A. That is right.

Q. How long have you owned that ranch?

A. Since 1908.

Q. And you have been operating it ever since then? A. Yes.

Q. Do you hold a public office in Owyhee County? A. I guess I do.

Q. What is that office?

A. County Commissioner, Third District.

Q. The Third District of Owyhee is what area?

A. Well, from the range land between Grandview and Bruneau east to the Nevada line.

Q. Are you familiar with the location of the old Henry Rubelt place? A. That is right.

Q. Is that in your district? A. Yes.

(Testimony of Albert L. Harley.)

Q. How long have you known Henry Rubelt, Senior? A. Well, some 40 odd years.

Q. Do you consider yourself pretty well acquainted with him? A. Well, pretty well.

Q. Have you had occasion to see him frequently through the years? [117]

A. Yeah, a few times.

Q. You mean a few times over 40 years, or a few times a year?

A. Well, that is the last few years. A long time ago when the freights, you know they used to come in and made my place a stopping place going through and I suppose they hauled back in the winter with provisions.

Q. Mr. Rubelt would stop at your place from time to time? A. Yeah, he has.

Q. And always has since you first knew him?

A. That is right.

Q. Have you been out to the Rubelt ranch itself?

A. Have I ever been there, is that what you mean?

Q. Yes. A. Yes, I was there.

Q. As a matter of fact, you rode over before it was homesteaded; is that right?

A. That is right.

Q. Are you familiar with the range land that the Rubelt place uses to graze its cattle on the public domain? A. Yes, very familiar.

Q. How do you happen to be familiar with that?

A. Well, I used to ride in that country.

(Testimony of Albert L. Harley.)

Q. You buckarooed your own cattle all through that area?

A. We lived just adjacent to that.

Q. Just adjacent to it? A. That's right.

Q. You are familiar with the ranch land that is involved on the Rubelt grazing land?

A. Yes, I can say that.

Q. You have seen the meadow land, hay land, on the Rubelt place? A. Yes.

Q. You are familiar with the ranch house and out buildings? A. Yes.

Q. Have you seen those? A. Yes.

Q. Have you ever stayed at the ranch house?

A. Yes.

Q. Tell the Court what kind of a house it is as best you can remember? A. Nice house.

Q. Comfortable place?

A. It was a comfortable place.

Q. There has been testimony in this case from the official from the Bureau of Land Management that Mr. Rubelt has a Graze 1 cow right of 450 head with 25 horses, making total Graze 1 right of 475 head; based upon your knowledge of the property, your personal knowledge of the ranch, and the fact that the place carries a 475 head right; do you have an opinion as to the value of the Rubelt place in 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and it is incompetent. [119]

Mr. Greenfield: I asked him if he had an opinion.

The Court: He may answer that question.

(Testimony of Albert L. Harley.)

Q. Do you have an opinion? A. Yes.

Q. In the course of your duties as a county commissioner do you have occasion to familiarize yourself with land values through your district?

A. Yes, to a certain extent.

Q. Do you think you have a general knowledge of the value of property in that area in 1950?

A. Yes.

Q. I will ask you to state what you believe in your mind the value of the Rubelt property to be in 1950, the fair market value?

Mr. Anderson: Object on the ground no proper foundation has been laid. It is incompetent and immaterial.

The Court: Objection sustained. Just a general knowledge doesn't give him any qualification to testify to that.

Q. Mr. Harley, you own a cattle ranch yourself?

A. Yes.

Q. And you own a stock ranch in the same general area? That is the Owyhee County area?

A. You mean on the range?

Q. Yes. A. Yes. [120]

Q. Are you familiar with the value of the ranch property and range rights through the years in that area and what they have been bought and sold for without reference to any specific sales? A. Yes.

The Court: You are going to have to put this up somewhere near close to the time of this transaction.

(Testimony of Albert L. Harley.)

Through the years doesn't mean anything to this court.

Q. Do you believe in that in 1950 you were aware of the value of ranch property and of range rights in that area at that time?

A. Well, I think I am, considering it is my home.

Q. Considering the fact that you are a county commissioner is it part of your job to be aware of land values in this district? A. Yes, sir.

Q. I will then ask you again your opinion as to the fair market value of the Rubelt property in 1950?

Mr. Anderson: Object on the ground no proper foundation has been laid and it is incompetent, irrelevant and immaterial.

(Argument followed off the record.)

The Court: I am going to let him answer for what it is worth.

Q. What is your opinion then, Mr. Harley, of the fair market value of the Rubelt property in the spring of 1950 when this transaction here was entered into? [121]

Mr. Anderson: If the Court please, I renew my objections and I point this out at this time. The transaction made in April of 1950 was one of lease with option to purchase at a future time—ten years in the future. It was not a sale transaction. It was purely a lease transaction. Now, I think if Mr. Bybee prevails in this action that he will exercise the option, nevertheless to this time the transaction is one of lease with an option in the future. I main-

(Testimony of Albert L. Harley.)

tain that the value back at the time the lease was made is not relevant here.

The Court: For whatever it is worth I am going to let this testimony go in. Your objection will be in the record. I have some doubt about it, but inasmuch as this is a court case I am going to let it in for whatever it may be worth.

(Pending question read.)

“Q. What is your opinion then, Mr. Harley, of the fair market value of the Rubelt property in the spring of 1950 when this transaction here was entered into?”

A. I should say in my own mind it was worth about \$200 a cow unit.

Q. What would be your round figure—we will go back and develop how you arrived at it?

A. What I mean is that you take a ranch without a cow unit— [122]

The Court: That isn't the question.

Q. Now what is that opinion, that is the question. What in your opinion is the value of the ranch?

A. Seemed like at that time that was always talked about—the cow units, that is all I can go by.

Q. You say \$200 a cow unit. Do you have reference to 475 head range right that the Bureau of Land Management testified to?

A. Well, if he has that.

Q. So if he has 475 head graze 1 right and raises 325 to 350 tons of hay, would you be—would it be your opinion that he had 475 cow units?

(Testimony of Albert L. Harley.)

A. That is right.

Q. So then your estimate of the value, or your statement of value is \$200 a cow unit? Would you multiply that out for the Court so it is in the record? 200 times 475 would be your statement of value; is that correct? A. Yeah.

Q. I multiply that out to be \$95,000; is that your opinion? A. I never added it up.

Q. Sir? A. I never multiplied it.

Q. Maybe we had better have you multiply it.

Mr. Anderson: I think the record will speak for itself.

The Court: The court can figure it. [123]

Q. We are dealing here also with a lease arrangement with an option tied on to the end of it, so I would like to get your opinion, if you have one, as to the fair rental value of that property on a yearly basis at that time?

Mr. Anderson: Object on the ground no proper foundation has been laid. It is irrelevant and incompetent and immaterial.

The Court: Objection sustained. I don't think the foundation has been laid.

Q. Do you have any information as to what range rights were renting for in that area at about that time? A. No, I don't believe I do.

Q. Do you have any idea of what hay was selling for at about that time? A. How is that?

Q. Do you have any idea of what hay was selling for at about that time?

(Testimony of Albert L. Harley.)

A. 1950, I think about \$18.

Q. As a ranch owner and operator do you have an opinion as to what you would rent a ranch for, and what you think would be a fair rental price on a yearly basis on similar property in that area?

Mr. Anderson: Object on the ground that is incompetent and immaterial.

Q. I asked if he had an opinion. [124]

The Court: Well——

Mr. Greenfield: I will ask another question.

Q. Do you think in 1950 you were informed and knew the retail value of ranch property in that area? A. Yes, I do.

Q. Then I will ask you what in your opinion was the rental value on a yearly basis of the Rubelt property in 1950?

Mr. Anderson: Object on the ground that is incompetent, irrelevant and immaterial. It is not within the issues of this case, and no proper foundation has been laid.

The Court: He may answer.

Q. What would you say would have been a fair rental value on the Rubelt property in 1950 on a yearly basis? A. That many cattle?

Q. 475 head? A. \$6,000 or \$7,000.

Q. How do you arrive at the figure you give us of \$6,000 or \$7,000 a year? What makes you believe it would be worth that?

A. Well, the stock range as I know it is a good range.

(Testimony of Albert L. Harley.)

Q. Does the amount of hay raised enter into your calculations?

A. I don't know how much hay he puts out.

Q. Well, the testimony in this case is that he puts up 325 to 350 tons a year?

A. Yes, that would have to be considered. [125]

Q. How much would you say that hay was worth in 1950?

A. Well, I should say about \$18.

Q. Taking into consideration the range right and the ranch as you know it, and the amount of hay and value of it, it is then your opinion \$6,000 or \$7,000 a year was a fair rental price at that time? A. Yes.

Q. Directing your attention from around 1949, 1950, what can you say as to Mr. Rubelt's personal physical condition during those years with particular reference to his hearing, if you had occasion to notice whether or not he had or didn't have impaired hearing?

A. Well, the only time I noticed was I met him several times and where he used to speak to me, you know, or talk, why I would have to get in close to him and tell him and——

Q. Well, what in particular did you notice about his hearing?

A. Well, he had been failing, naturally.

Q. His hearing wasn't as good as it used to be?

A. No.

Q. What can you tell us as to whether or not he was able to recognize you immediately?

(Testimony of Albert L. Harley.)

A. Well, after I talked to him a little bit why then he recognized me.

Q. Did he seem to recognize you to start with or only after a while did he recognize you?

A. Well, I don't know how long it was. Two or three minutes talking with him and he finally knew who I was. [126]

Q. When you testified that in your opinion the fair market price of the Rubelt place in 1950 would have been approximately \$95,000 you are talking about cash money?

A. Yeah, that is right.

Q. Or at least money where you would get interest on the balance? A. Yes.

Q. Now would you think, Mr. Harley, that an arrangement whereby Mr. Rubelt in 1950 entered into a ten year lease of the ranch at \$3,000 a year with an option then the tenth year to purchase the place for \$40,000 with the ten years of rental payments, \$3,000 a year or \$30,000 to be applied on the purchase price, and the balance of the \$40,000, or the sum of \$10,000 to be paid over an additional three year period, and with Mr. Rubelt to pay all the taxes and state land lease rentals for the ten year period, and with the balance drawing no interest; would it be your opinion that that was a fair deal and a fair price for that place.

Mr. Anderson: Object on the ground that is incompetent and irrelevant. Calls for a conclusion of the witness.

(Testimony of Albert L. Harley.)

The Court: Objection sustained. That is a question for the court.

Cross Examination

Q. (By Mr. Anderson): You are County Commissioner of Owyhee County? A. Yes. [127]

Q. How long have you been county commissioner? A. Ten years.

Q. You were county commissioner back in the year 1950?

A. I was county commissioner when?

Q. In 1950? A. That is right.

Q. And as county commissioner you sit on the County Board of Equalization to equalize and fix the values on different taxes on property in your county? A. Yes.

Q. And did back in 1950? A. Yes.

Q. And did equalize the property in the district that you represent, as well as throughout the whole county? A. Yes.

Q. Now did you assess property in Owyhee County, the full cash value or percentage of the full cash value? A. Percentage?

Q. What percentage of the full cash value did you assess for lands on the taxes on the Rubelt property? A. 35 per cent.

Q. You assessed that type of land at 35 per cent on the full cash value; is that right?

A. Yes, that is right.

Q. That was back in 1950? A. Yes. [128]

Q. And in 1949? A. Yes.

Q. Has that been true ever since?

(Testimony of Albert L. Harley.)

A. Yes, that is right.

Q. So the assessment of the Rubelt place for the year 1949 will be 35 per cent approximately of what you considered to be its full cash value; is that right?

A. Well, that is—the real estate value.

Q. Well, that is the assessment on the Rubelt place; isn't it?

A. Yes, the assessment, that is right.

Q. And the same is true in 1950?

A. That is right.

Q. Do you know what the assessed value of the Rubelt place was in 1950?

A. No, I couldn't say right off hand.

Q. Now the assessment of property is made as the law requires as of the second Monday of January at twelve noon? A. That is right.

Q. And the assessment was made in the year 1950, wasn't it? A. Yes.

Q. There wasn't any great fluctuation of value between the second Monday of January, 1950, and the 12th day of April, 1950, was there?

A. No. [129]

Q. But you are not able to tell us what the assessed value was?

A. No, I am not able to.

Q. Do you know what the tax rate was per hundred dollars on assessed valuation in that locality back in the year 1950?

A. \$3.00 a hundred.

Q. Was that the county levy or did it include

(Testimony of Albert L. Harley.)

the school levy? A. County levy.

Q. What about the school levy?

A. Well, the school levy is—that is a little different than the county levy.

Q. What was the total tax levy made on the property in that area per one hundred dollars assessed value in the year 1950, as near as you can tell us?

A. What was the tax valuation?

Q. What was the rate of levy on the property? On the Rubelt place in that area?

A. \$3.00 and some odd cents.

Q. That is for the county alone, isn't it?

A. Well, I want—I don't want to get mixed up on that.

Q. Well, what is the total levy out there this year? I mean 1954?

A. I think the school was in that levy.

Q. In the \$3.00? A. I think so. [130]

Q. Was the state in that levy too?

A. That is right.

Q. The total levy then as near as you recall in 1950 per hundred dollars of assessed value out there was \$3.00 and what?

A. Some fraction. I don't remember the fraction of cents.

Q. Now Henry Rubelt whom you have known for quite some years is rather a remarkable man for his age; isn't he? A. He is.

Q. I beg your pardon? A. He is.

Q. Still is a rather remarkable man for his age?

(Testimony of Albert L. Harley.)

A. Well, you know I have known him for quite a while. I know he has failed in the last few years.

Q. But still quite a remarkable man for his age; isn't he? A. That is right.

Q. Has a remarkable mind for his age?

A. Well, I don't know about that.

Q. You conversed with him today in the hall?

A. No, I never talked to him.

Q. You didn't talk to him today?

A. Not today, talked with him yesterday.

Q. Yesterday? A. Yes. [131]

Q. You think his condition now isn't quite as good as it was last year?

A. Well, I couldn't say that, Gene, I don't know. I just know that he is naturally failing, you know, since I have known him all my years.

Q. How long would you say he has been failing?

A. That I have known him?

Q. How long has he been failing?

A. I should say the last five or six years that I have noticed.

Q. And up to five or six years ago you didn't see any change in him?

A. Oh, yes, you can see a change in him.

Q. Well, he was not failing up to five or six years ago?

A. I don't know how to answer that. The only thing I know he had been failing the last few years. I don't know just how long.

Q. You still are able to converse with him; aren't you? A. Yes, that is right.

(Testimony of Albert L. Harley.)

Q. And he talks rational; doesn't he?

A. Yes.

Q. And recognizes what you say to him?

A. Well, he is a little hard of hearing, more than he used to be, that is the only thing.

Q. Just a little hard of hearing?

A. Yes. [132]

Q. But you don't have any difficulty in making yourself heard in your conversation with him?

A. No, have to talk loud, you know.

Q. Talk little louder than you do normally?

A. Yes, I do, that is right.

Q. How long has it been since you have been down to the ranch house on this Rubelt place?

A. I think it was '37 when I was there and stayed all night.

Q. 1937? A. Yes.

Q. Have you been there at all since?

A. No.

Q. You haven't been at the Rubelt place since 1937? A. No.

Q. You have some range in the Jack Creek Meadows area?

A. That is right, and the Potholes.

Q. That is some distance north of the ranch of Mr. Rubelt?

A. Yes, and ahead of Blue Creek.

Q. And you have had sheep drift over to the Rubelt ranch? A. Yes.

Q. And some drift of the cattle over to his ranch? A. Yes.

(Testimony of Albert L. Harley.)

Q. Young Henry is taking care of it?

A. He is what?

Q. Young Henry takes care of this drift of the Rubelt cattle? [113]

A. Used to.

Q. I mean when he operated it then?

A. That is true, yes.

Redirect Examination

Q. (By Mr. Greenfield): When you assess a stock ranch you are making assessment on the real property, aren't you? A. That is right.

Q. You don't tax the range right, the Federal range right?

A. No, not the Federal range, no.

Recross Examination

Q. (By Mr. Anderson): Don't you take into consideration the carrying capacity of land in arriving at your valuation?

A. What do you mean?

Q. Don't you take into consideration the carrying capacity in arriving at your valuation?

A. Yes.

Q. In other words, the range rights that are attached are a part of this?

A. Yes, that is what makes a range.

Q. That is what gives it its value?

A. Yes.

Q. That is what you take into consideration in

(Testimony of Albert L. Harley.)

fixing that value for tax purposes, isn't it?

A. That is right. [134]

Redirect Examination

Q. (By Mr. Greenfield): If you consider a Federal range right to be \$200 a head and if you consider a stock ranch, the land itself to be worth so much an acre and you are assessing that ranch, do you assess it on the basis of the real estate per acre, or do you assess it on the basis of \$200 a head on the Federal range right?

Mr. Anderson: Object on the ground that is argumentative, leading and suggestive and improper redirect.

The Court: Objection sustained.

Q. Well, when you are assessing the value of a place for tax purposes do you include the value of the Federal range right, or don't you?

A. In assessing lands you mean?

Q. Yes.

A. No, I don't believe we do.

Q. (By Mr. Anderson): Do you take into consideration the range right in arriving at the value of the land in which you are assessing?

A. That is right.

Mr. Greenfield: I am not sure I understand. He has answered it both ways now.

The Court: Yes. Go ahead and find out how he arrives at the value of the land. [135]

Q. When you arriving at a tax valuation on a

(Testimony of Albert L. Harley.)

piece of ranch property, what factors do you take into consideration in trying to place a value upon that ranch?

A. You mean as a commissioner?

Q. As a commissioner for purposes of taxation?

A. Well, the—we don't consider the cow unit.

Q. You don't consider the cow unit?

A. Just the value of the land. You take meadow land, worth so much you know, and there is different prices, and grazing land.

Q. Now on grazing land, you are talking about deeded land? A. That is right.

Q. Owned by the person you are assessing?

A. That is right.

Q. Do you take into consideration the value of the Federal range right for tax purposes?

A. No, I don't.

Mr. Greenfield: That is all.

Q. (By the Court): I want to know whether the fact that that ranch has attached to it a Federal grazing right incident to the use of that land, whether that increases the value of the ranch, and whether you take that into consideration?

A. You mean——

Q. For tax purposes? [136]

A. For tax purposes.

Q. Putting your evaluation on it? A. No.

Q. In other words, the land is worth just as much without the grazing right as it is worth with it; is that right?

A. No, I didn't say that.

(Testimony of Albert L. Harley.)

Q. I am talking about for tax purposes?

A. Well, the tax is what they raise on an acre of land.

Q. Would you put the same assessed value on that ranch if it didn't have the grazing right?

A. You mean the cow unit?

Q. Yes. Would you put the same value on the ranch for assessment purposes without the grazing right as you would with it for tax purposes?

A. It would be the same.

The Court: That is all.

(The witness was excused.)

The Court: We will recess until tomorrow morning. [137]

Next day, February 9, 1955, 10:00 a.m.

LEONADRO TOTORICA

called as a witness, being first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Leonadro Totorica.

Q. Where do you reside?

A. I reside at Mountain Home.

Q. How long have you lived in the Mountain Home-Bruneau area? A. 23 years.

Q. Where were you born?

A. I was born in Bruneau.

Q. Until recently did you own a stock ranch?

(Testimony of Leonadro Totorica.)

A. Yes.

Q. Where? A. Juniper Mountain.

Q. Tell the Court where Juniper Mountain is generally with respect to the area of Riddle?

A. That is about 40 miles west of Rubelt's place.

Q. You are referring to the old Henry Rubelt place? A. Yes.

Q. That is the ranch that is here in litigation?

A. Yeah. [138]

Q. How long did you own this property at Juniper Mountain, when did you buy it?

A. About 20 years.

Q. 30 years? A. 20 years ago.

Q. Were you in that with your brothers?

A. Yeah, three of my brothers.

Q. Did you recently sell out to them?

A. Yeah, I sold to them.

Q. When was this?

A. That was the fall of 1952.

Q. In the fall of 1952?

A. Wait a minute, I think it was '53.

Q. Have you been on the old Rubelt place?

A. Yes.

Q. When did you first see that place?

A. 1931.

Q. Then was there a time when you worked for Joe and Charlie Sewell on the Beacon place?

A. Yes.

Q. Where is the Beacon place?

A. That is east of Rubelt's place.

(Testimony of Leonadro Totorica.)

Q. In any event, the Beacon ranch is right next to the Rubelt place? A. Yeah, east. [139]

Q. How long did you work there?

A. Six months.

Q. Now during the period that you were working on the Rubelt place, and then later during the years you owned a ranch along with your brothers on Juniper Mountain, would you have occasion from time to time to pass through the Rubelt place?

A. Yes, I was through there once in a while.

Q. You have seen the meadow land there?

A. Yes.

Q. You have seen the ranch house and the out buildings? A. Oh, yes.

Q. You have seen the reservoirs on the place?

A. Yes.

Q. Are you familiar with the range that the Rubelt's cattle run on? A. Yes.

Q. And you have ridden that range yourself?

A. Yes.

Q. Directing your attention to the year 1950, what can you tell the Court with respect to the old Mr. Rubelt, and his physical condition with particularity to his hearing ability?

A. Well, he can't hear very good at that time.

Q. What do you know regarding his eyesight?

A. I wouldn't know anything about the eyesight.

Q. You know he had trouble hearing you?

A. Yeah. [140]

Q. Can you tell the Court whether or not Mr.

(Testimony of Leonadro Totorica.)

Rubelt at that time appeared to be mentally alert?

A. Well, he is kinda slow all the time, I suppose it is because of his age maybe.

Q. You say he was kinda slow? A. Yeah.

Q. What do you mean by that?

A. Well, he wouldn't get the meaning of something.

Q. He wouldn't get the meaning of something?

A. Yeah, what you were talking about.

Q. In having conversations with him yourself you observed that? A. Yes.

Q. What do you recall regarding any conversation with him, or any observation of him with respect to whether or not his memory appeared good or bad?

Mr. Anderson: Fix that as to time.

Mr. Greenfield: During 1950?

A. Well, he was slow, just slow getting things.

Q. And slow remembering? A. Yeah.

Q. Now, Mr. Totorica, from having been on the range in the area of the Rubelt place, and having sold it in 1952 or 1953; do you think that you have a knowledge, a general knowledge, of stock ranch values in that area in 1950? A. Yes. [141]

Q. Do you think you have a knowledge?

A. Yes.

Q. Are you familiar with the value of similar property to the Rubelt place at that time in that area?

A. Well, the ranches were selling at the price of a cow unit.

(Testimony of Leonadro Totorica.)

Q. That is the value of those places was generally arrived at by so much a cow unit?

A. Yes.

Q. Now the testimony that has been previously presented here in this trial shows that the Rubelt place had a cow right, Federal range right of 475 head, Graze 1 right? A. Yes.

Q. The testimony further shows that the Rubelt place produced 325 to 350 ton of hay, so that there was sufficient hay for the cattle in the winter months.

Mr. Anderson: We object to the last statement by counsel that there was sufficient hay. There is no evidence of that. We ask that be stricken.

The Court: That portion may be stricken.

Q. The evidence is there was 325 to 350 ton of hay, and based upon your familiarity with the area, you having sold similar property and your familiarity with land values that you testified to, and those facts; is it your opinion—what in your opinion was the value of the Rubelt place, fair market value in 1950? [142]

Mr. Anderson: Object on the ground that it is incompetent, and the witness has not been properly qualified. I would like to inquire in aid of objection.

The Court: Very well.

Q. (By Mr. Anderson): You were one of the four brothers of the Totorica Company?

A. Yes.

Q. That was a corporation? A. Yes.

(Testimony of Leonadro Totorica.)

Q. That corporation had some grazing land out in the Juniper Mountain area? A. Yes.

Q. And it had a ranch down at Grandview next to the river? A. Yes.

Q. And it had sheep? A. Yeah.

Q. And what you sold was your stock in Totorica Company, wasn't it, your corporate stock?

A. Yes.

Q. You didn't sell any ranch? A. No.

Q. You didn't own any ranch of your own, it was the company's ranch?

A. It was the corporation's.

Q. Yes. That sale you say was in 1953?

A. 1953. [143]

Q. Prior to that time your occupation was herding sheep, wasn't it? A. Running sheep.

Q. Running sheep. You actually went out and herded them; didn't you? A. Yes.

Q. Tended camp?

A. No, not tending camp, take care of the cow tenders and things like that.

Q. That has been your occupation since you were a boy?

A. No, that was my occupation last four years in the Totorica Company. I was herding sheep before.

Q. You were herding sheep before that?

A. Yes.

Q. And you herded from the time you were a boy before you sold out three or four years ago?

A. Yes.

(Testimony of Leonadro Totorica.)

Q. Which is it?

A. Four years before.

Q. Four years before you sold out?

A. Not four years, before I was herding sheep and then I was foreman. I was running the sheep from 1951 to—from 1950 to—I will say from 1949 to 1953.

Q. And since you sold out what has been your occupation? A. Bartender, tending bar.

Mr. Anderson: We object on the ground the [144] witness has not been properly qualified, and that the evidence is incompetent.

The Court: The objection will be sustained.

Mr. Greenfield: I would like to make an offer of proof on this witness.

The Court: Very well.

Mr. Greenfield: Comes now the plaintiff and offers to prove by the witness Leonadro Totorica that if this witness were permitted to testify he would testify in his opinion the value of the old Henry Rubelt place in 1950 was approximately \$100,000, and that the basis of his valuation is that the cow right on the place was worth approximately \$200 per animal unit. The witness would further testify that in his opinion the fair rental value of the Rubelt property in 1950 on a yearly basis was \$7,000 to \$7,500 per year.

Mr. Anderson: We object on the ground that the witness has not been qualified to so testify, and that it is incompetent and irrelevant.

The Court: The objection will be sustained.

(Testimony of Leonadro Totorica.)

Mr. Greenfield: That is all.

Cross Examination

Q. (By Mr. Anderson): You have known Mr. Rubelt casually, I take it, for quite some time?

A. Yes. [145]

Q. He is a rather remarkable man physically and mentally, isn't he? A. Yes.

Q. Man of very strong physique?

A. Yes.

Q. And very strong personal opinions?

A. Yes.

Q. Is that right? A. Yes.

Q. Very strong mind down through the years; is that right? A. Yes.

Q. And you were able to talk to him all right, but he was just a little hard of hearing; wasn't he?

A. That is right.

Q. You were able to carry on a conversation with him; weren't you? A. Yes.

Q. Even up to this time you are able to carry on a conversation with him in a normal way; aren't you? A. Yeah.

Q. And you have carried on conversations with him here during the course of this trial; haven't you? A. Yes.

Q. And in this court house, this building, you carry on conversations with Mr. Rubelt?

A. Yes. [146]

Q. You carry on conversations with him in the hall out here? A. Yeah.

(Testimony of Leonadro Totorica.)

Q. Court room hall? A. Yeah.

Q. And carried on conversations with him here in the court room, haven't you? A. Yes.

Q. He is not what you would call deaf, he is just a little hard of hearing? A. Huh, huh.

Q. And is still a man of remarkable mental ability for his age; isn't he?

A. Yeah, for his age.

Q. He is able to comprehend what you state to him in conversations?

A. Well, I wouldn't know that.

Q. You wouldn't know that? A. No.

Q. But you do carry on the conversations with him? A. Yes, I carry on conversations.

Q. He is not insane, is he? A. What?

Q. He is not an insane man?

A. No. [147]

Q. Not by any means. He was able out there on the ranch during the last years he was there to fully take care of his business, wasn't he?

A. Well, I wouldn't know about that either.

Q. You don't know about that?

A. No, I don't know about that.

Q. You know he was there taking care of it, don't you? A. He was there, yes.

Redirect Examination

Q. (By Mr. Greenfield): You have known Mr. Rubelt many years?

A. Yes, I have known him many years.

Q. Since starting in 1949 or 1950 and up to the

(Testimony of Leonadro Totorica.)

present time do you think he is as mentally alert and understood as well as he used to be?

A. No, he isn't as capable as he used to be.

Recross Examination

Q. (By Mr. Anderson): You remember Mr. Rubelt particularly as he is right at the present time, don't you? A. Yes.

Q. He has been getting a little older and his faculties have been giving some during the last five years, haven't they? A. Yes.

Q. He was a lot better five years ago then he is now, wasn't he? [148] A. I think he was.

Mr. Anderson: That is all.

Mr. Greenfield: That is all.

(The witness was excused.) [149]

HERSCHEL DAVIDSON

called as a witness, being first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): Will you state your name? A. Herschel Davidson.

Q. You live here in Boise? A. Yes.

Q. What is your occupation?

A. I am in the real estate business and appraiser for land.

Q. How long have you been so engaged?

A. Since 1935.

(Testimony of Herschel Davidson.)

Q. What has been some of your experience as a land appraiser?

A. I have appraised a lot of land for the Government for condemnation purposes. Cascade Reservoir, Anderson Reservoir, and something to do with Lucky Peak and so forth.

Q. Were you involved in the Strike Dam condemnation? A. Yeah.

Q. And you appraised some ranch property in that condemnation proceedings? A. Yes.

Q. That was in 1951, was it not?

A. 1951, yes.

Q. In the course of your experience over the last 20 years in appraising land as a part of that—a good part of it has been involved in appraising stock ranches? [150]

A. Part of it, some of it has been, yes.

Q. Have you had occasion from time to time to appraise the value of Federal grazing rights?

A. Not so much that, no, not appraising that, but only as it applies in the picture of a—

Q. You have had experience in arriving at the value of Federal grazing rights as it applies to appraising of the property? A. Yes.

Q. Are you familiar with the range area in the neighborhood of Riddle? A. Yes.

Q. Now in the neighborhood of 1950, Mr. Davidson, did you have occasion to be familiar with the value of Federal range rights in that area?

A. Yes.

Q. Are you familiar with the purchase and sale

(Testimony of Herschel Davidson.)

of Federal range rights in that neighborhood about that time?

A. You mean just the Federal range by itself, or as it applies to a unit?

Q. Is valuation placed on Federal range rights on the sale of ranch property?

A. It would be pretty hard to say when a ranch out there is sold for so much money, just how much of that is Federal range and how much is other.

Q. But Federal range rights are transferable; aren't they? [151] A. Yes.

Q. They are transferable? A. Yes.

Q. They are negotiable? A. Yes.

Q. They have a value by themselves?

A. Yes.

Q. Are you familiar with the value of Federal range rights in 1950 within that area?

A. Yes.

Q. Now will you state to the Court your opinion of the value of Federal range rights, Grazing 1 right, in 1950, in the area we are talking about?

Mr. Anderson: Object on the ground that is incompetent and irrelevant in this hearing, and not within the issues of this case. The witness has not been properly qualified.

The Court: He may testify.

Q. What then, Mr. Davidson, in your opinion was the value of range rights at that time?

A. I would say at that time in 1950 the range rights for Federal range were sold at quite a wide variation.

(Testimony of Herschel Davidson.)

Q. What would you consider a minimum figure?

A. Well, I had known some that sold for as little as \$80, and some for \$175. [152]

Q. What do you think the fair market value was on them at that time?

A. Well, it's pretty hard to just say what is the fair market value unless it is pinned to a certain ranch and you investigate it, but probably around \$125 to \$150.

Cross Examination

Q. (By Mr. Anderson): I take it, Mr. Davidson, you have not been out on the Rubelt ranch?

A. I have been past it, Gene, I know where it is but I have never looked at it. I have not been over that ranch, just past along the road and saw it off the—off down the field.

Q. Of a ranch like that is of practically no value without a range right, is it?

A. The value of that range depends upon how many cattle you can carry. The value of the ranch depends upon the ability to raise feed, to feed the cattle through the balance when there is no range. The ranch depends upon its ability to produce feed when there is no feed on the range, so there you are.

Q. Then would you say that the value of the Rubelt ranch depends upon the probable range?

A. Yes, it does.

Q. You say you are familiar with the range in

(Testimony of Herschel Davidson.)

that area; that is a high rim rock country up there, isn't it?

A. It is a good range country. [153]

Q. Well, now tell me this, that is rim rock country, isn't it?

A. Yes, rim rock plateaus, it has valleys, deep canyons, sure. Some of it is rocky, awful rocky.

Q. Do you think you would recognize the house at the Rubelt place?

A. I doubt very seriously whether I would because, as I say, I never was right up to it, just off down along the road.

Q. How far beyond the Rubelt place did you go on that road, Mr. Davidson?

A. In miles or in time?

Q. In miles?

A. You can measure distance over there in time about as well as you can miles.

Q. How far did you go on the road, as you recall?

A. We climbed through Big Springs and the Wickahoney country, somewhere in between there we passed the place, and it was just casually called to my attention that was the Rubelt place.

Q. Do you think the Rubelt ranch is on the range from Big Springs to—Big Springs to Wickahoney?

A. I don't know if it is or not, but in that area. I was all over that country.

Q. When was that?

A. 1951. I went out to Riddle.

(Testimony of Herschel Davidson.)

Q. What is the name of the area out around where the Rubelt place is, if you know? [154]

A. I don't know.

Q. Never heard of it that you recall?

A. Probably have, yeah, I have heard of it.

Q. What is it?

A. I couldn't tell you. I don't know.

Q. Was that name Yatahoney?

A. Wickahoney.

Q. Wickahoney was the name you have in mind?

A. Yes.

Q. That is the place where you were?

A. Yeah, I have been there.

Q. Wickahoney? A. That is right.

Mr. Greenfield: Object to this line of questioning. The witness never testified he was familiar with the ranch. Immaterial whether he was or wasn't.

The Court: I believe he testified he was familiar with the country around there.

Q. Now it is the Wickahoney area where you were?

A. I have been all over that country.

Q. Have you ever been in the Yatahoney area?

A. Yes, it is all the same country.

Q. The Yatahoney and the Wickahoney you think are the same country?

A. Very similar.

Q. What do you mean similar, you mean they are in the same [155] place?

A. No, I mean similar in terrain.

(Testimony of Herschel Davidson.)

Q. When were you in the Yatahoney country?

A. The same period.

Q. Where is the Yatahoney country?

A. It is in Owyhee County.

Q. Where in Owyhee County?

A. Southeast, southerly portion.

Q. Where in the southerly portion?

A. I don't know. You are looking at the map and I haven't got it.

Q. I am not looking at it?

A. Well, it would be south and east of the Big Springs country, of course.

Q. Mr. Davidson, I think you testified that many things go into the value of stock ranches or grazing rights? A. Yes, they do.

Q. The depth of the snow and the length of the winter feeding season goes into the value, doesn't it?

A. The length of the period, yes, has a very definite basis of value—the feeding period.

Q. Now the feeding season out in the area of the Rubelt ranch, the Riddle area, is how long? Five months?

A. No, I wouldn't think it would be five months.

Q. How long would you say?

A. It would depend upon your snow, Gene, in that area. [156]

Q. That country has an average of three feet of snow, doesn't it? Some years more and some years less?

A. Some years it does have and some years it don't. Sometimes doesn't have hardly any.

(Testimony of Herschel Davidson.)

Q. Can you tell us anything about the elevation of that country, the sea level?

A. It is close to a mile.

Q. You mean 5,280 feet high? A. Yes.

Q. More or less than that?

A. I don't know. I don't know just exactly what the elevation is, but in that country it is close to it. It would be near in that neighborhood of 5,000 feet, yeah.

Q. And of course the accessibility to a ranch or range is another item to be taken into consideration in fixing value, isn't it?

A. That hasn't got the impart on the value of a stock ranch that it does on other type of ranch property.

Q. But it is an item you take into consideration?

A. Doesn't have much bearing on the valuation of a ranch.

Q. But it does bear on the value, doesn't it?

A. Has some bearing on the value possibly, but the value of the stock ranch is not as dependent upon location as other ranches for the simple reason that by the virtue of the nature of the business people expect to find them in isolated and desire to have them there. [157]

Q. You wouldn't value a ranch in the Bruneau Valley the same as you would a ranch out here where the Rubelt place is, would you, if they were the same acreage?

A. Well, no, of course not.

(Testimony of Herschel Davidson.)

Q. The Bruneau Valley would be worth much more, wouldn't it?

A. In that area most of the people that have ranches have their ranches in the Bruneau Valley, and they may extend clear back into Nevada.

Q. You mean some of the sheep ranches do?

A. Yes.

Q. What kind of ranches extend out into Nevada?

A. I couldn't say, but recall—well, out to the Nevada line, let's put it that way if you want to get technical.

Q. The location does go into value, doesn't it?

A. Location goes into value of course, but it is——

Q. Mountain Home is the nearest railroad point to the Rubelt ranch, isn't it? A. Yes.

Q. How far is it from Mountain Home to Riddle? A. About 80 miles.

Q. How far is it from Riddle to the Rubelt ranch? A. I don't know.

Q. You travelled that road, what was its condition when you travelled it in 1951?

A. Rough. [158]

Q. What do you mean rough?

A. Narrow, rocky road.

Q. As a matter of fact, there was no road there, just trail out through the desert there, wasn't it?

A. Yes. You couldn't get in only with a pickup, I think anything slower than a pickup you would be in a bad fix.

(Testimony of Herschel Davidson.)

Q. Of course, the range loss in some areas is another item that is taken into consideration in fixing value, normal operating range loss?

A. Range loss, sure.

Q. In areas where the range loss is comparatively high, then range rights are worth much less than where the range loss is lower?

A. Water supply and periods the range is available.

Q. Let's take a range loss; that makes a difference in value too, doesn't it?

A. Yes, it would if it was——

Q. Some areas have a greater normal operating range loss than others?

A. That would be true.

Q. You made one answer that intrigued me. Are you familiar with grazing rights, Taylor grazing rights? A. Yes.

Q. And aren't Taylor grazing rights always attached to land?

A. That is right, they are acquired. [159] Taylor grazing rights are acquired by proof, originally anyway, proof of use.

Q. Stay with my question. They are attached to land, aren't they?

A. Yes, they are attached to land.

Q. And are transferable with the land, and only with the land?

A. That has been my understanding, yes.

Q. And are not transferable separate and apart from the land as distinguished from forest rights?

(Testimony of Herschel Davidson.)

A. That is my understanding. Forest rights pass with the cattle and Taylor rights pass with the land.

Q. But may be transferred by an owner from one piece of land to the other if the land will qualify as commensurate property?

A. That's right.

Q. But otherwise they are not transferable?

A. It has to be done through your range set up.

Q. But otherwise they are not transferable?

A. That is right.

Redirect Examination

Q. (By Mr. Greenfield): With the authority of the grazing, Taylor grazing, it is possible, isn't it, to actually sell a Taylor grazing right to someone else if he has base property that is commensurate to which it is attached?

Mr. Anderson: Object on the ground it calls [160] for a conclusion of the witness. I don't think it is a fact anyway.

The Court: I think you went into that a little bit. He may answer.

A. Yes. That is the same question. One fellow asked it one way and the other, the other.

Recross Examination

Q. (By Mr. Anderson): You mean to tell me from the witness stand that a man can transfer a grazing right separate from the land to which it is attached?

A. By permission of his—if he has got some

(Testimony of Herschel Davidson.)

other land it can be attached to, yes, by permission of the Board.

Q. The same owner when transferred from one portion of his land to another piece of his land?

A. Yes.

Q. That is the limit to his right of transfer?

A. I don't know whether it has to be his land or not, but one piece of land to another piece of land regardless of ownership may be transferred.

(The witness was excused.)

The Court: We will take a short recess. [161]

EDWIN NEWELL

called as a witness, having been first duly sworn, testified as follows, upon

Direct Examination

Q. (By Mr. Greenfield): State your name, please? A. Edwin L. Newell.

Q. Where do you reside?

A. Emmett, Idaho.

Q. Mr. Newell, what occupation do you engage in? A. I am a farmer and cattle man.

Q. How long have you been engaged in the cattle ranching business?

A. Well, Idaho about 37 or 38 years.

Q. And before you came to Idaho you were in the stock business elsewhere?

A. Yes, I was in the stock business in eastern Oregon.

Q. Have you had any experience in appraising

(Testimony of Edwin Newell.)

land property? A. Yes.

Q. What has been that experience?

A. Well, I have appraised land for different agencies. I appraised land for the Bureau of Reclamation, appraised some land for the Idaho Power on the C. J. Strike dam. I have appraised land for the army engineers and other agencies.

Q. Over how long a period have you engaged in appraisal work? [162]

A. Well, my first real appraisal work was in 1940, I believe.

Q. Now in the course of your experience as an appraiser of real property, have you had experience in appraising stock ranches? A. Yes.

Q. And have you had occasion to become familiar with the value of Federal range rights under Taylor grazing? A. Yes.

Q. Now in 1951, Mr. Newell, did you have occasion to do some appraisal work in connection with the C. J. Strike condemnation? A. Yes.

Q. During that period did you and a Mr. Herschel Davidson together travel through the country south of Bruneau?

A. Yes, I believe it was there.

Q. Evaluating the range? A. Yes.

Q. And cattle property through there?

A. Yeah.

Q. Are you generally acquainted with the character and quality of the range land in the area south of Bruneau and on down to Riddle, Idaho?

A. My only experience in there was when I was

(Testimony of Edwin Newell.)

on the C. J. Strike appraisal, and we covered that country in south of Bruneau pretty generally. [163]

Q. You examined the range land?

A. Yes.

Q. Do you think that you are familiar with the value of Federal range rights under the Taylor grazing in that area in 1950 to 1951, around that period?

A. Yes, I think so.

Q. Will you state what in your opinion was the per unit value of a Federal range right under Taylor grazing for seven months of summer?

Mr. Anderson: May I inquire in aid of an objection.

The Court: You may.

Q. (By Mr. Anderson): Mr. Newell, in appraising range properties to which are attached grazing rights, the grazing rights are just one of the items that is taken into consideration in fixing the value of the property, isn't it?

A. If I understand—I don't quite understand.

Q. In other words, when you appraise a live-stock ranch you take into consideration the grazing rights in arriving at the value of the ranch; don't you?

A. Well, if I was appraising a ranch I would, yes, but I have known of grazing rights being transferred without transfer of real property. I don't want to get mixed up on the question.

Q. Let's stay with the question here. The grazing rights are just one of the things to be taken

(Testimony of Edwin Newell.)

into consideration in fixing the value of a ranch, isn't it? [164] A. Yes.

Q. And the value of any grazing right depends considerably upon a ranch as commensurate property, doesn't it?

A. Yes, I think it would.

Mr. Anderson: We object on the ground it is incompetent, irrelevant and immaterial. The question here is the value of this ranch with the grazing rights attached, not the separate value of any item but the whole value.

(Argument followed.)

The Court: So far I don't think the proper foundation has been laid for him to answer questions as to the value of grazing.

Q. (By Mr. Greenfield): Mr. Newell, we are concerned here with the value of certain grazing rights attached to a place known as the old Rubelt place, 17 miles from Riddle, Idaho, and about 80 miles south of Mountain Home. The testimony has been that the ranch carries a 475 head Class 1 Taylor grazing right, for approximately seven months a year summer grazing. The range land is in the area south of Bruneau, between Bruneau and Riddle, Idaho, over which you and Mr. Davidson stated you have travelled. The range to which these rights are attached raises 325 ton to 350 ton of hay. The range has certain deeded land with state land lease rentals attached to it; based upon that information and considering the area in which these rights lie; [165] what is your opinion as to

(Testimony of Edwin Newell.)

the value of the grazing rights per unit in 1950?

Mr. Anderson: Object upon the ground that the witness has not been properly qualified, that the proper foundation has not been laid.

The Court: I think the question is premature. The objection will be sustained. He didn't say he had an opinion as yet.

Q. Based on those facts, do you have an opinion as to the value of the range rights involved here per unit?

A. Yes, on the—based on the facts you have given me I would.

Q. Now will you state what that value was in 1950?

Mr. Anderson: Object on the ground the proper foundation has not been laid. The witness has not been properly qualified, and it is incompetent, irrelevant and immaterial.

The Court: I think he may answer.

Q. What value would you place on it, Mr. Newell? A. About \$150 per unit.

Mr. Greenfield: You may cross examine.

Cross Examination

Q. (By Mr. Anderson): Mr. Newell, do you know where the Rubelt ranch is?

A. No, sir, no more than what has been explained to me here this morning. [166]

Q. Just purely hearsay with you?

A. Yes, I haven't been on the place.

(Testimony of Edwin Newell.)

Q. Do you know where the range with that ranch is situated?

A. Not any more than what has been described to me.

Q. Well, separate and apart from the question here you have no other information, have you?

A. I have been in that general area that covered the Grassmere and Wickahoney area.

Q. You have been in the Wickahoney area?

A. Yes.

Q. You have been in the Grassmere area?

A. Yes.

Q. But not, not at the Rubelt area?

A. Not that I know of. I don't recognize that name or ever having been there.

Q. Do you know how far the area where the Rubelt ranches are is from the Wickahoney?

A. Just what I have been told.

Q. Just what you have been told?

A. Yes, about 15 or 20 miles.

Q. You were told that in the courtroom here?

A. Yeah.

Q. Is that by road or as the crow flies?

A. I don't know.

Q. Who told you that?

A. Well, let's see, George Greenfield and this gentleman [167] sitting here by him.

Q. Mr. Smith told you that?

A. (No answer.)

Q. Of course, it wasn't your practice to appraise

(Testimony of Edwin Newell.)

ranches by what you call animal units until after these Idaho Power cases in 1951, was it?

A. Well, I had appraised a great many places with grazing rights attached prior to that.

Q. Yes, but you just appraised the ranch and took into consideration grazing rights?

A. I think the Idaho Power case was the first case I definitely tied it to animal units and used that system.

Q. And you didn't do it in that case, did you?

A. Yes, if I remember right I did, Gene.

Q. Now, Todd, there is a lot of things that go into the value of grazing land? A. Yes.

Q. One of the things is the feeding season on a range to which it is commensurate, isn't it?

A. Yes.

Q. Do you know what the feeding season is out at the Rubelt ranch? A. No, I don't.

Q. Do you know what the elevation there is?

A. No. [168]

Q. Do you know what the snow fall in that area is? A. No.

Q. That goes into the evaluation too, doesn't it?

A. Yes, it would. Now generally speaking, as I was over that area and I have heard the testimony of interested parties, and I have got a pretty good idea.

Q. Over what area, Todd?

A. Well, the desert area south of Bruneau. It was covered by Mr. Watts' and Mr. Black's ranches.

Q. And that is the area you were over?

(Testimony of Edwin Newell.)

A. Yes.

Q. Do you know the nature of the range on the Rubelt area?

A. Only what I have been told.

Q. Only what you have been told?

A. Yes.

Q. Do you know the name of that area out there, range area? A. No.

Q. That is desert country out there, isn't it?

A. Yes, it would be.

Q. And it is rim rock country, desert and rim rock, pretty rough, isn't it?

A. Well, the place I was over was, yes.

Q. Awfully rough? A. Yes. [169]

Q. By rough you mean it has deep, rough, dry canyons with rim rock and rocky plateaus, doesn't it?

A. Yes, it is a flat desert area with some canyons and some rocks.

Q. The further south you go into that area the worse it becomes; is that right?

A. Well, I don't know. I couldn't say about that.

Q. Accessibility of a ranch with grazing rights, isn't that a matter to take into consideration in fixing value, isn't it? A. Yes.

Q. Do you know how far it is to the Rubelt ranch from Mountain Home, the nearest railroad point? A. No, I wouldn't know exactly.

Q. Do you know how far it is to Riddle?

A. No, I never kept track of the miles even when I—at the time I was in that county I did know

(Testimony of Edwin Newell.)

the miles to places I was to, but I have forgotten, Gene.

Q. From Mr. Greenfield's question to you did you assume that the Rubelt ranch was on the road from Mountain Home?— From Mountain Home to Riddle?

A. No, I didn't exactly assume that.

Q. Did you assume it was between Mountain Home and Riddle, that is what was stated in the question?

A. I assumed it was near Riddle, somewhere beyond Grassmere. [170]

Q. You don't know how far it is from Riddle or in which direction? A. No, I don't.

Q. Todd, where the average snowfall is three feet in the winter——

Mr. Greenfield: I object to that, your Honor. I don't think anybody testified there was three feet of snow out there.

The Court: Doesn't have to, it is a hypothetical question.

Mr. Greenfield: A hypothetical question has to be based upon a statement in evidence.

Mr. Anderson: There has been testimony that the average is about three feet, even Mr. Rubelt's deposition said that.

Q. (By Mr. Anderson): Where the average snowfall is about three feet, and the elevation is a mile high, the average feeding season is about four and a half to five months?

A. If the area was a mile high, you say?

(Testimony of Edwin Newell.)

Q. Snow about three feet deep on the average?

A. I don't know about that area, but the areas I do know about five and a half to six months grazing season in that elevation.

Q. That is the feeding season in the winter. How much hay does it take to carry a cow through such a feeding season? [171]

A. Well, maybe I got that wrong. Did you say feeding season?

Q. Yes.

A. I was talking about grazing season.

Q. I see. Let's go to feeding season?

A. That's pretty high there——

Q. Can you tell us?

A. Well, that might depend on some conditions, Gene, that I hate to answer. Now you mean if all the area was a mile high, there was no draws or low places or places where there would be feed available?

Q. I mean the feeding season in the rim rock area about a mile high?

A. Well, I would say if the whole area was a mile high, and there was no lower places where cattle might get and graze, that would be a five month's season.

Q. How much hay does it take to winter an animal in such country, a grown animal?

A. Well, that depends again too on the type of hay you have.

Q. We will take say native grass hay, some timothy and clover?

(Testimony of Edwin Newell.)

A. I imagine about a ton and a quarter.

Q. To winter each animal? A. Yes.

Q. The range properties that produce the hay in a cow ranch with grazing rights is known as commensurate property, isn't it? [172]

A. Yes.

Q. And the commensurability or carrying capacity of the ranch lands that produces the hay goes into—is an item to take into consideration in fixing grazing rights, isn't it?

A. Well, the availability of water is, yes.

Mr. Anderson: That is all.

Mr. Greenfield: That is all. The plaintiff rests, your Honor. [173]

Mr. Kaufman: We have several motions at this time that we would like to make.

The Court: Very well.

Mr. Kaufman: Come now the defendants in this action and move that Paragraph III of the further and separate defense asserted in their answer, appearing on Page 4 of the answer, be amended to conform to the proof adduced here, in that Paragraph III as amended then will read as follows: That by reason of the premises the plaintiff is estopped by laches from asserting at this time the claims set forth in his complaint, and that the said claim of the plaintiff is barred by the provisions of the Idaho Code 5-218, Subsection 4. The portion that I added there is the last part of the sentence, "and that the said claim of the plaintiff is barred by the provisions of the Idaho Code 5-218, Subsec-

(Testimony of Edwin Newell.)

tion 4." That is the statute of limitations pertaining to fraud.

The Court: Have you anything to state?

Mr. Greenfield: Object to that on the ground it is untimely and not authorized, or in accordance with the Federal Rules of Civil Procedure, and on the further ground that provisions in paragraphs and answers are not to be amended during the trial since all of the facts upon which the answer is based are available by discovery procedure to the defendant prior to trial. [174]

The Court: The motion will be granted.

Mr. Kaufman: The second motion is: Comes now the defendants and move for a dismissal of the plaintiff's cause of action on the ground that upon the facts and the law the plaintiff has shown no right to relief as prayed for in his complaint.

(Argument followed on motion.)

The Court: Are those the only motions you have?

Mr. Kaufman: Yes.

The Court: I am going to take it under advisement until two o'clock this afternoon.

(Whereupon, recess was taken at 11:35 a.m., until 2:00 p.m.)

After recess, 2:00 p.m.

The Court: During the noon recess, gentlemen, I have considered the pleadings in this case and also reviewed the evidence, and the Court has come to the conclusion that the proof has failed to establish the allegations in the complaint. First, there is

(Testimony of Edwin Newell.)

a vital issue of jurisdiction raised by the answer which was not proved. There is no evidence of any diversity of citizenship with reference to one of the defendants, no evidence whatsoever. Secondly, the proof utterly fails in my opinion to show any fraud on the part of the defendants. Giving the evidence of the plaintiff [175] all the weight that can be given, about all that it shows is that the plaintiff was an old man, that his hearing was a little impaired, and perhaps could not see as good as he might have in his earlier days, but there is no testimony that he was incompetent to transact business. As a matter of fact, the evidence shows that the parties went to the offices of an attorney in Mountain Home where the lease and option were prepared. There is no evidence that that attorney was the attorney of the defendants. If the deposition which was read is given any weight, it shows conclusively that the attorney was the attorney of the plaintiff, and thereafter the plaintiff worked for the defendants on the ranch, and later amended his transaction by making an amendment to the lease and option, extending the time within which the option could be exercised. So, as I say, it appears to the Court that the evidence utterly fails to show any fraud or misrepresentations on the part of the defendant. Consequently, the motion to dismiss will be granted. Anything further? I think under the rules that Findings of Fact and Conclusions of Law must be prepared. The Court will adjourn.

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBIT No. 3

DEPOSITION OF D. O. BYBEE

Be It Remembered that at 2:00 p.m. on Monday, 21 September 1953, at Suite 312, Continental Bank Building, Boise, Ada County, State of Idaho, pursuant to oral stipulation contained herein, the deposition of D. O. Bybee, one of the defendants herein, was taken before me, a Notary Public in and for the State of Idaho.

Appearances: George A. Greenfield, Attorney-at-Law, of Boise, Idaho, and Laurence N. Smith, Attorney-at-Law, of Boise, Idaho, appeared on behalf of the plaintiff. Eugene H. Anderson, Attorney-at-Law, of Boise, Idaho, and Samuel Kaufman, Jr., Attorney-at-Law, of Boise, Idaho, appeared on behalf of the defendants.

Whereupon, the following proceedings were had at the time and place aforesaid:

Mr. Greenfield: It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys that the deposition of D. O. Bybee, one of the defendants in the above entitled action, may be taken upon oral examination before Frank J. Kester, a Notary Public in and for the State of Idaho, at the law office of George A. Greenfield, Suite 312, Continental Bank Building, Boise, Idaho, on Monday, the 21st day of September, 1953, beginning at the hour of 2:00 p.m.; that said deposition may be taken on oral interroga-

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of D. O. Bybee.)

tories for the purpose of discovery or use as evidence by either party in the above styled cause, or for both purposes; that all formalities as to notice, taking, transcribing, signing, transmitting, and certification, other than as provided in this stipulation, and the signature of deponent, are hereby waived; but excepting as to the form of questions, any objections as to competency, relevancy, or materiality are hereby reserved and may be made at the time of trial.

Mr. Anderson: It is so stipulated.

D. O. BYBEE

one of the defendants herein, called as a witness by the plaintiff, and being first duly sworn, testified as follows, upon

Cross Examination Under the Statute

Q. (By Mr. Greenfield): Will you state your name, Mr. Bybee? A. D. O. Bybee.

Q. Where do you now reside?

A. Well, I have two or three residences, I have one at Riddle, Idaho, one at Grandview, and one at Nyssa, Oregon.

Q. Which one do you consider your home?

A. Riddle, Idaho.

Q. Directing your attention to May 15, 1953, where were you physically living at that time?

A. Well, I may have been at Riddle, or—you mean that very day? I may have been at Riddle, or

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

I may have been at Nyssa, or I may have been at Grandview; I don't know.

Q. With regard to the year 1953, this year, what percentage of the time have you been physically present in Idaho, and what part in Oregon?

A. Well, I will just have to guess at that. I think I have been in Idaho probably twenty or thirty, maybe 35 per cent of the time.

Q. And the remainder of the time you have been in Oregon, principally Nyssa? A. Yes.

Q. When you are in Idaho where do you stay?

A. Well, I have a little ranch house at Shoofly, at Grandview, and mostly I stay at the ranch at Riddle.

Q. The ranch is the Rubelt place?

A. Yes.

Q. (By Mr. Greenfield): When you are staying at the Rubelt place, is there anyone else there?

A. Yes.

Q. Who else is there?

A. I have people working for me; Norman Cutler and his wife.

Q. And who else?

A. Different fellows who work for me.

Q. Mrs. Cutler does the cooking?

A. Yes.

Q. Do you pay her for it?

A. I just pay them a certain amount, between him and her; and haying time I expect to pay her extra.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. Do you pay her anything extra to cook for you when you are there?

A. Not necessarily.

Q. You have a room there in the ranch house?

A. Yes, sir.

Q. What personal effects do you have there at the ranch house, clothes and household goods and that sort of thing?

A. Just about the clothes I wear; I don't keep too many clothes there.

Q. Do your wife and children accompany you to Riddle when you go there?

A. Occasionally.

Q. Frequently, or not?

A. Quite infrequently.

Q. They normally remain at your residence in Nyssa? A. Yes, sir.

Q. (By Mr. Greenfield): During 1953 you state that you have spent from twenty to thirty per cent of your time in Idaho. Have there been months when you spent more of your time here than other months? A. Well, I think so.

Q. What months do you think you were here for a longer period of time than other months?

A. Well, I haven't kept track at all, but I am not here what you would call steady, and I am not there what you would call steady; I just come over here to do my business, and I haven't kept track of it one way or the other.

Q. Your principal business in coming to Idaho

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

is to transact your ranching business, and when you are through with it you go back to Nyssa?

A. Yes.

Q. Do you stay on your ranch at Riddle weeks at a time, or do you go home on week-ends?

A. I generally go home on week-ends, to Nyssa.

Q. In answer to Interrogatory No. 2 propounded by the plaintiffs you stated that in 1951 you registered to vote in the State of Idaho at Riddle, Idaho, and in 1952 you voted in the general election at Riddle, Idaho. Will you state, if you can recall, about when in 1951 you registered to vote in the State of Idaho?

A. Well, I wouldn't know exactly what time that was. I was down there, and they were registering, and I said, "Well, I think that I have stayed here long enough I have become a resident," and I wanted to become a part of those people down there, and I don't know when I registered. I suppose that could be found on the books.

Q. (By Mr. Greenfield): Was that some time during the summer? A. Yes, sir.

Q. Was it prior to the 1st of September?

A. I think it was.

Q. Now, you state in answer to the Interrogatory that you have been a resident of the State of Oregon, you had been a resident of the State of Oregon up to about May 15th. So it was only two or three months after you—according to your own

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of D. O. Bybee.)

statement—ceased to be a resident in Oregon that you registered to vote in Idaho?

Mr. Anderson: I think, Mr. Greenfield, that is patently an error there, and that registration was made during the election year.

(Discussion of counsel, off the record.)

Mr. Anderson: Did you register last year, or the year before?

The Witness: Last year.

Mr. Anderson: Then your answer to Interrogatory No. 2 should have read that you registered to vote in the State of Idaho in the summer of 1952, and not 1951?

The Witness: I think that would have been correct.

Mr. Anderson: That's very well. I just wanted to know.

Q. (By Mr. Greenfield): Do you hunt and fish, Mr. Bybee? A. Very little.

Q. Do you purchase hunting and fishing licenses?

A. No. Sometimes I do; not very often.

Q. (By Mr. Greenfield): Did you purchase a hunting and fishing license this year?

A. No, sir.

Q. Last year, 1952?

A. Not that I remember. A year or so ago I got a license in Oregon, but I do very little hunting and fishing.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. You think you got an Oregon hunting and fishing license in 1951?

A. I think it would have been 1951. I lived down there. I couldn't say for sure. I have gotten about one or two licenses since I came up here, thirteen years.

Q. You have never purchased an out-of-state hunting and fishing license? A. No, sir.

Q. Any hunting and fishing license you purchased in Oregon, you purchased as an Oregon resident? A. Yes, sir.

Q. Since May 1, 1951, Mr. Bybee, have you made any financial statements to any lending companies for the purpose of obtaining credit, in which you stated a residence?

A. Well, I think I have.

Q. To whom have you made those financial statements?

A. This Boise Real Estate and Loan, I obtained some money from them, and I must have.

Q. About when was that?

A. About a year ago.

Q. That would have been in the fall of 1952?

Mr. Anderson: Spring of 1952.

Q. (By Mr. Greenfield): In the spring of 1952?

A. Yes.

Q. Do you recall, on that statement, whether or not you listed a place of residence?

A. I don't remember.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. (By Mr. Greenfield): You may have?

A. I may have; I don't remember.

Q. Could you produce a copy of that application, or authorize its inspection?

A. If you can find it.

Q. Is it satisfactory with you, and do you authorize us to inspect the financial statement you made the Boise Loan and Realty, for the purpose of determining whether or not a place of residence is stated?

Mr. Anderson: No, that has other evidence on it that has no concern to you, and there are many other avenues through which you can obtain the information you seek.

Mr. Greenfield: The record shows, then, that the defendants——

Mr. Anderson: (interposing) ——do not authorize you to inspect the application for a loan from the Utah Mortgage Company in the spring of 1952.

Mr. Greenfield: And you likewise refuse to provide a copy of it?

Mr. Anderson: We do not have a copy of it.

Q. (By Mr. Greenfield): Have you applied for any life insurance, Mr. Bybee, since May of 1951? A. I think so.

Q. On those applications have you stated a place of residence?

A. Well, I don't think I did. The fellow came to my place in Nyssa, and wrote me up some insurance there.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. (By Mr. Greenfield): What company was it?
A. The Beneficial.

Q. And you don't know whether or not the application showed your place of residence?

A. I don't remember answering that question.

Q. Do you know who the agent was?

A. Ronald—I don't recall, now.

Q. You may think of that, a little later?

A. Yes. I know him very well, and I should think of his name.

Q. Do you possess a driver's license, Mr. Bybee?
A. Yes, sir.

Q. Do you have it with you? A. Yes, sir.

Q. May I see it?

A. (Witness produces a document from wallet.)

Q. Your driver's license which you have handed me, Mr. Bybee, is dated March 12, 1952, expiring April 9, 1954, and gives your address as Route 2, Nyssa, Oregon. I will ask you if that is the home address which you gave to the Law Enforcement officers of the State of Oregon when you purchased your license in March, 1952?

A. That is the renewal; you have to renew those every two years.

Q. You are aware of the fact that you are required to give to the Law Enforcement officials any change of residence when you renew a license?

Mr. Anderson: We object to that as incompetent, irrelevant, and immaterial.

(Deposition of D. O. Bybee.)

Plaintiff's Exhibit No. 3—(Continued)

Mr. Greenfield: You refuse to let the witness answer that question?

Mr. Anderson: We refuse to answer that question.

Q. (By Mr. Greenfield): You did not give any change of address to the Law Enforcement people when you renewed your license in March, 1952?

Mr. Anderson: We refuse to answer that.

Q. (By Mr. Greenfield): Mr. Bybee, do I understand that you desire to correct your reply to Plaintiffs' Interrogatory No. 1?

Mr. Anderson: No, we do not desire to change the answer to that.

Q. (By Mr. Greenfield): Mr. Bybee, do you still state that your place of residence on May 1, 1951, or about that time, changed from Oregon to Idaho?

A. Well, these dates—I have never kept any track of any dates or anything. I think it was the spring of '52, but I have lived down there off and on all the time since I got that place, and I moved down there in the spring of '52.

Q. Then a statement that you were a resident of Idaho ever since May 1, '51, is not correct?

A. Well, I haven't said that I lived there continuously since May 1, 1951.

Q. Have you ever stated that you were a resident of Idaho, have been a resident of Idaho, ever since May 1, 1951, Mr. Bybee? A. No.

Mr. Anderson: This is a damnably unfair type

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

of examination, and you know it! Show the gentleman the statement.

Mr. Greenfield: I assumed he has read it, signed it, and sworn to it.

Mr. Anderson: He has read it, but his memory is probably no better than yours is.

Q. (By Mr. Greenfield, handing document to witness): Is that answer true or false?

A. Sir, ever since I have got that ranch I have spent every minute of my time down there that I could spare, because my interests are down there. The dates I never kept any track of, because I never knew anything like this was coming up, and all I have had in mind was putting over these projects herein Idaho. Now, if I don't remember those dates, I don't remember them.

Q. Would you say the answer to Interrogatory No. 1 which you just read is true or not?

A. Oh, I think that's true, as much as—as far as I know the dates on that.

Q. So, in answer to the Interrogatories, you stated and you now stated that you have lived in Idaho ever since May 1, 1951; is that correct?

Mr. Anderson: I think the Interrogatory says "about that time." A. Just as I told you.

Q. (By Mr. Greenfield): Now, referring to your driver's license, which lists your address as Nyssa, Oregon, which you acquired in March, 1952: In March, 1952, you did not advise the Law Enforce-

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

ment officers of Oregon that your residence had changed?

Mr. Anderson: We object to the form of your question.

A. As I remember, sir, all I did was send in and have my license renewed.

Q. (By Mr. Greenfield): Have you ever applied for or purchased an Idaho driver's license?

A. No, sir.

Q. Where do you do your banking, Mr. Bybee?

A. Nyssa, Oregon.

Q. You have banked there for years?

A. More recently I have done some financing through the P. C. A. at Ontario.

Q. Have you made any statements to the Production Credit Administration or the Ontario bank, as to place of residence, in applying for loans?

A. Not that I know of. There may have been in that. They know all of my operations.

Q. In reply to Plaintiffs' Interrogatory No. 3, you stated that your Federal and State income tax for 1952, prepared by an accountant in Ontario, Oregon, listed your place of residence as the State of Oregon. Did you ever inform your accountant of your purported change of address?

A. I don't remember whether I did or not. I don't remember him ever asking me.

Q. When he prepared your Federal income tax return for 1952, did you go over it with him before you signed it?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. Not too thoroughly. I gave him all the information I had. I don't understand those things too well, and do just about what he tells me to do, because I wouldn't understand it if I studied it.

Q. You would understand if the form listed Malheur County, Oregon, as your residence?

A. If I read it over, I would, yes, sir.

Q. (By Mr. Greenfield): Did you read it over before you signed it? A. No, sir.

Q. Do you know where your Federal return for the calendar year '52 was filed, whether it was filed in Portland or in Boise?

A. I don't know. The bookkeepers took care of that.

Q. Did you file an Oregon State income tax return for the year 1952?

A. I suppose I did. They take care of all that.

Q. Do you know whether or not you paid any Oregon income tax? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Did you file an Idaho income tax return for 1952? A. I think so.

Q. You may not have, or you may; you don't know? A. Yes, I paid some taxes in Idaho.

Q. Do you own a private passenger car?

A. Yes, sir.

Q. What kind of car is it? A. Packard.

Q. Where is it registered? A. Oregon.

Q. Is that the automobile——?

A. (Interposing) That may not be true. Now,

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

I got that in Nampa, and I don't know whether that's going to be—he asked me where I wanted to register that, and he took it over and registered it in Oregon. I just had a wreck with the other car, and I haven't got the plates yet on this car.

Q. (By Mr. Greenfield): You purchased another car, in Nampa, and the dealer asked you where you wanted to register it, and reviewing the matter you decided to register it in Oregon?

Mr. Anderson: That isn't what he said.

Q. (By Mr. Greenfield): Is that the automobile you use to travel between Nyssa and Idaho, usually?

A. The old one, I did; this is the new one; and I use the jeep sometimes.

Q. This Packard is registered in your name in Oregon? A. Yes.

Q. Do I understand, then, Mr. Bybee, that you have the great bulk of your personal effects, household goods, furniture, and personal belongings, at your Nyssa, Oregon, home? A. Yes, sir.

Q. And as much time as you can spend away from your ranching activities in Idaho, you spend with your wife and family in Oregon?

A. Yes, sir.

Q. You have children in school?

A. Yes, sir.

Q. What ages are they?

A. One is nineteen, and one's twelve.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. The twelve-year-old child is enrolled in the public schools of the State of Oregon?

A. Yes, sir.

Q. Have you ever paid any out-of-state tuition for that child, or does the child go to school as a resident of the State of Oregon?

A. I think that's taken care of by the taxes I pay over there.

Q. (By Mr. Greenfield): You don't pay any out-of-state tuition as an Idaho resident would pay for a child he sends to school in Oregon?

A. No, sir.

Q. Do you consider that your wife and children are residents of the State of Oregon?

A. Yes, sir.

Q. Mr. Bybee, is W. A. Bybee your brother?

A. Yes, sir.

Q. You have business dealings with him?

A. Yes, sir.

Q. You are in business together in the State of Oregon? A. Yes, sir.

Q. And you are in business together in Owyhee County, Idaho? A. Yes, sir.

Q. What is the nature and type and extent of your business relations with your brother in Idaho?

A. Well, we leased the Rubelt ranch with the option of buying it, together; and also he and my brother-in-law purchased the Shoofly ranch in Grandview, together.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. You and your brother, W. A. Bybee, then, are full and equal partners in the Rubelt deal?

A. Yes, sir.

Q. And always have been? A. Yes, sir.

Q. When did you first meet Henry Rubelt?

A. Well, it was the spring of '50, I think, just a few days before this contract was drawn up.

Q. (By Mr. Greenfield): Where did you meet him? A. Out at his ranch.

Q. You had never met him previous to that?

A. No, sir.

Q. Prior to the time of seeing Mr. Rubelt for the first time, had you had any discussions with your brother, W. A. Bybee, regarding the acquisition of the Rubelt property? A. No, sir.

Q. You had never discussed it with W. A., prior to the time you went over to discuss it with Rubelt the first time? A. No, sir.

Q. Had you ever discussed it with anyone?

A. Yes, sir, there was a gentleman—I don't know his name. I was looking for a ranch, and I went to the Bruneau Bank and talked to—I suppose—the manager in there; I think it was Mr. Caldwell; at that time I didn't know him, but I had been told that that was his name. And I didn't get any encouragement about where I could buy a ranch. So I started out west. I came to the junction where it turns back to Grandview, and I—just before I got there I passed an old gentleman and his wife in a Model A car, and I stopped them and

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

talked to them a little while, and asked them if they knew where there was a ranch for sale, and they told me about the Rubelt ranch.

Q. What did they tell you?

A. They told me it was for sale, and they seemed to know something about it; they said it was for sale, and they suggested I talk to Mr. Ocamica about it; he was the son-in-law.

Q. (By Mr. Greenfield): What did you then do?

A. Well, I asked him about if he knew about that place, whether it was for sale, his father-in-law's place, and he said it was.

Q. This is Mr. Ocamica you are talking about now?

A. Yes, sir.

Q. What else did he say?

A. Well, of course I didn't want to—this other fellow told me it was a long ways out there, and I didn't want to drive out there unless I had a chance of buying it, or something, or leasing it or something, so I asked him as much as I could about the land and its possibilities, and the price of it.

Q. What did he tell you?

A. You mean about the price?

Q. Whatever he told you about the ranch.

A. I said, "How much does he want for the ranch?" So he told me this was a good grazing ranch and had two reservoirs on it. I asked him, "How much does your father-in-law want for it?" and he said he didn't know. And I said, "Do you

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

suppose he would want \$20,000.00 for it?" and he said, "More than that." And I kept raising. I said, "Twenty-five or thirty thousand dollars?" and he said, "More than that." And I said, "Do you suppose he would want \$40,000.00?" and he said, "I think something like that."

Q. Did you have any further conversations with Mr. Ocamica at that time?

A. No, I left, then, and I went up and started towards the ranch.

Q. When you arrived at Mr. Rubelt's ranch, who was present?

A. Of course at that time I didn't know who it was, but I know how it was Young Henry's wife, and Mr. Rubelt.

Q. (By Mr. Greenfield): Did you have any conversation with Mr. Rubelt then?

A. Well, first, Mrs. Rubelt came to the door.

Q. Young Henry's wife?

A. Yes. And I asked her if the place was for sale, and she said, "Well, the old man's in here, and you can ask him." And he came to the door about then, and I said, "Do you want to sell this ranch?"—or she said it—and immediately he said, "No," and walked kind of fast out of the door and out in the yard, and in a little while he came back and started in conversation, and he said, "Do you want to buy this ranch?" and I said, "Yes," and he said, "Let me show you around." So he took me—I got him in my car, and we went up to the first

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

reservoir, as close as we could. We had to walk quite a little ways, because the ground was wet. And he showed me the reservoir, and the amount of water they would hold, and then we came back down to the house. And then he wanted to show me the upper field and the upper reservoir, and the water was up too high to get over there in the car, so we walked up to the upper field; and he wanted to take me up to the upper reservoir at that time, but I told him I didn't have time. The old gentleman was a better walker than I was. He just about had me walked out, by that time. So we came back, and after a conversation about the ranch I told him I would go home and get my brother and come back out and look at the ranch.

Q. Did you then leave?

A. Yes, sir.

Q. (By Mr. Greenfield): On this first occasion when you talked to Mr. Rubelt, he appeared to be in good physical health?

A. I will say he did; he walked me up to the top of one reservoir, and up in the other field, and I could hardly walk when I got back.

Q. Did he appear to be mentally alert?

A. Yes, sir.

Q. You noticed no rambling in his conversation, or any indication of faulty memory, or anything like that? A. No, sir.

Q. Did you notice whether or not he appeared to have good eyesight?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. I think his eyesight is impaired.

Q. What caused you to come to that conclusion?

A. I asked him something about driving a car, and he said his eyesight wasn't good enough to drive a car, that he hadn't driven a car for a few years.

Q. Was there anything else that suggested to you that his eyesight was impaired, that you recall?

A. Well, I associated with the old gentleman quite a little after that, and I think he could just about read the headlines of the paper and that's all.

Q. Did you notice whether or not he appeared to be hard of hearing?

A. Well, sometimes Mr. Rubelt does act like he is a little hard of hearing, and other times he has very alert hearing. I think probably his hearing is pretty good.

Q. You think probably he just hears what he wants to?

A. Well, I don't know about that.

Q. (By Mr. Greenfield): After you left the Rubelt place that first time, where did you go?

A. Came home.

Q. Back to Nyssa? A. Yes, sir.

Q. Did you stop anywhere along the way, do you recall, Mr. Bybee?

A. Oh, I think I stopped at Grassmere. I stopped at Grassmere going out, too, and asked the way out there, and asked what I could find out

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

about the ranch; and I think I stopped coming back, too.

Q. Whom did you talk to at Grassmere, either time?

A. Well, a fellow by the name of Jack Thompson; in fact, I think both of the boys were there, Jack and the other one.

Q. So you talked to the two Thompson boys, both on the way in and the way out, probably?

A. I wouldn't say exactly. They were strange to me then. I talked to some people in there, and I later found out their name was Thompson. There was a lady in there by the name of Blanche.

Q. What did they tell you about the ranch?

A. They told me it was a good old ranch; it was isolated out there, but there was quite a lot of grass feed.

Q. When you left Grassmere, where did you go next?

A. I came through Boise, and on home.

Q. Did you come through Mountain Home at all, or did you come through the cut-off?

A. I think I came through Mountain Home; that's always the best route.

Q. Did you stop at Mountain Home at all?

A. Maybe for gas.

Q. (By Mr. Greenfield): You didn't discuss the ranch with anyone at Mountain Home, at all?

A. No.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of D. O. Bybee.)

Q. When you left Mountain Home, you went straight to Nyssa? A. Yes.

Q. And when you arrived at Nyssa, you discussed this ranch with your brother, W. A. Bybee?

A. Yes.

Q. What did you tell him about it?

A. I told him I thought it was a pretty good spread out there, if we could manage to swing the deal.

Q. When did you return to Idaho?

A. I think it was about two days later.

Q. And at that time did you then return to the ranch?

A. Yes, I took my brother out there.

Q. Now, between these two visits to the Rubelt ranch, did you discuss this pending deal with anyone besides your brother?

A. Yes, I had a fellow working for me by the name of Bud Keller, who had spent considerable time out in that country, and he told me about a fellow over here named Glenn Sebern that used to be a foreman on the U. D., and the U. D. is a ranch right close to it, and I called him up on the telephone and he told me about the ranch.

Q. What did he tell you about the ranch?

A. He told me it was a pretty good spread in there, that the water was kind of limited, but if a fellow could buy it right he thought it would be all right.

Q. (By Mr. Greenfield): Did you discuss the

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

pending Rubelt deal with anyone else other than the ones you have stated, during the period between your first and second visits?

A. Oh, I may have talked to my wife.

Q. Anyone else? Anyone outside the family?

A. No, only Mr. Sebern.

Q. On your return to the Rubelt place the second time, was there anyone with you?

A. Yes, my brother, W. A.

Q. And who was present on the ranch?

A. Mrs. Rubelt, and Mr. Rubelt, Sr. Young Henry was there, but he was operating a cat, a caterpillar tractor, and he had it stuck over where he was cleaning out a ditch, so the old man told me, and he was to the Flying H ranch to get another caterpillar to come over and pull him. I didn't see him.

Q. Were you aware at that time that Young Henry had a ranch over in Oregon that was taking up most of his time?

A. The only thing I knew about that ranch was that this first fellow told me down there—I asked him the question, why his boy didn't run it, and he said he had other ranches on farther over there.

Q. You were aware, however, that old Mr. Rubelt was alone on the ranch, operationally?

A. I knew nothing about who was operating the ranch, excepting I went out there and Young Henry's wife was there with her family; and later on when I was waiting for them to move out, Young

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Henry and his family were all there and I waited thirty or forty days for them to move out.

Q. Did you know old Mr. Rubelt was running the ranch alone, at the time you were negotiating with him?

A. I didn't know who was running it; I didn't know whether anybody was running it then.

Q. (By Mr. Greenfield): Now, when you went to the Rubelt ranch the second time, with your brother, W. A. Bybee, did you have a conversation again with Mr. Rubelt? A. Yes, sir.

Q. What was said by you and your brother, and what by him?

A. When he priced the ranch to me, he wanted \$40,000.00 for it, and I didn't know whether it was worth \$40,000.00; I didn't think it was; it wasn't worth that to me at that time. And so I asked him if he would take less than that for the ranch at that time, and he said well, he didn't think he would. He kept holding for \$40,000.00, so I was about to leave, as near as I can remember; and so he said, "If you don't want to buy the ranch, I will lease it to you." And I said, "How much do you want to lease it?" And he said \$3,000.00. And I said, "Well, would you lease it to me with the option of applying the rent on the purchase price, in the event I decided to buy it?" And he said, "Yes," And I said, "Would you pay the taxes while I am leasing it?" And he said, "Yes." So after a con-

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

versation there for a while, we decided to go in and draw up the papers.

Q. You then left? A. Yes, sir.

Q. In your car? A. Yes, sir.

Q. And Mr. Rubelt with you?

A. Yes, sir.

Q. (By Mr. Greenfield): Where did you go then? A. We went to Mountain Home.

Q. And when you arrived at Mountain Home, where did you go?

A. We went up to Mr. Hall—Perce Hall's office.

Q. What time did you arrive there?

A. It was quite late at night; it must have been around six o'clock, I think. I was surprised that the office was open.

Q. Was he there?

A. Mr. Rubelt went over and opened the door and walked in.

Q. Was Mr. Hall there? A. Yes, sir.

Q. Had this matter ever to your knowledge been discussed with Mr. Hall, before then?

A. I had never seen Mr. Hall before, in my life.

Q. Now, how long did you stay in Mr. Hall's office?

A. Approximately a half an hour, I suppose.

Q. Did you explain to Mr. Hall what kind of a contract you and Mr. Rubelt wanted?

A. Yes, between us we did.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Mr. Anderson: You say, "between us." You mean——?

The Witness: Yes, between me and Mr. Rubelt.

Q. (By Mr. Greenfield): Who suggested going to Mr. Hall, in the first place?

A. Mr. Rubelt.

Q. What did he say?

A. I said, "Where can we go?" And he said, "Right up here."

Q. Who paid Mr. Hall for the work that he did?

A. As I remember, he charged us \$30.00, and we shared the expense, fifty per cent to him and fifty per cent to me.

Q. (By Mr. Greenfield): You each paid half?

A. Yes, sir, I think so, as I remember it. However, we didn't finish the contract then, sir.

Q. I gathered you didn't finish the contract that day.

A. We didn't pay him anything.

Q. At that time?

A. No.

Q. Did either of you go back and see Mr. Hall at a subsequent date?

A. I think it was not the next day, but I think it was about the second day, we made an appointment to meet Mr. Rubelt in the Mellen Hotel about one o'clock. And on the appointed day I went and waited for Mr. Rubelt quite a long while, and I decided he had missed the stage or something, and so I went up to Mr. Hall's to tell him Mr. Rubelt hadn't come in and I was going home, and Mr.

Plaintiff's Exhibit No. 3—(Continued)

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Rubelt was in Mr. Hall's office talking to him. That was quite a surprise to me.

Q. Did you stay and talk with him there?

A. Yes.

Q. How long did you stay there?

A. Well, he had the contract drawn up there, and he read it to us and explained it to us as he went along. And we signed the contract there. Wait a minute—my brother wasn't there that time; I just came back alone.

Q. Did Mr. Hall read the lease in its entirety at that time?

A. Yes, sir, and he would read a ways and then he would explain as he went.

Q. (By Mr. Greenfield): Do you think that Mr. Rubelt at that time seemed to understand what was provided by the lease and option agreement?

A. Yes, sir.

Q. Did you know how much the taxes and state land lease rentals at that time would amount to, at that time? A. No, sir.

Q. Or approximately? A. No, sir.

Q. Was any figure suggested?

A. I don't remember asking him; inasmuch as he was going to pay them, I thought he would know, and I don't remember asking him.

Q. You don't have any idea how much they would amount to?

A. I didn't give them a thought, because I wasn't

Plaintiff's Exhibit No. 3—(Continued)

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going to have to pay them for a while, so I don't remember seriously considering them.

Q. What was the purchase price of the property, as you understood it to be?

A. He asked me \$40,000.00.

Q. And that is what you agreed to pay?

A. Well, I wanted to buy it for less, but when he told me the terms I could buy it on, I agreed to his terms.

Q. It was your understanding you were paying \$40,000.00?

A. That was the full purchase price—that was the full rental and purchase price, yes, sir.

Q. What, in your opinion, Mr. Bybee, was the fair rental value of that ranch on a yearly basis, as of April 15, 1950?

A. Well, sir, I was very limited in my capital, and if I got that ranch I wouldn't be able to fully operate it. That is as much as I would have given him or anyone else for the ranch, under the circumstances.

Q. (By Mr. Greenfield): Apart from your own financial limitations, do you have an opinion as to the fair rental value of that property, at that time, on a yearly basis?

A. I wouldn't give any more for it now.

Q. More than what a year? A. \$3,000.00.

Q. Are you referring to its rental value as of the present time?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. Well, at the time I rented it, sir, or now,—either.

Q. If you were in your present financial position and renting it in April, 1950, you would still believe that the fair rental value of the place was about \$3,000.00 a year? A. Yes, sir.

Q. How do you arrive at that figure?

A. Well, I have operated out there for this many years, and it is very difficult out there—it's very difficult to hire a competent man to go out there and stay. It's very remote.

Q. If we assume, Mr. Bybee, that the taxes and state land lease rentals on the place run \$800.00 a year, would you then believe that \$2,200.00 a year would be a fair rental value?

A. I think that's as much good as it has done me, if that will answer your question.

Q. Were you familiar with the Taylor Grazing rights that are appurtenant with and attaching to the property?

A. I knew not too much about it at that time. I am a little familiar now.

Q. (By Mr. Greenfield): Did you know he had a ten-year grazing permit for 475 head of livestock?

A. He told me he had a Taylor Grazing right for 450 cattle and 25 horses.

Q. What, in your opinion, was the fair market value of that grazing right, in April of 1950?

A. Sir, I have never tried to purchase any oth-

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

ers, and I couldn't—I just figured that the whole deal was worth that much to me in my operations.

Q. Did you discuss the grazing rights with Mr. Rubelt when you were negotiating this deal?

A. Yes, sir, he told me that those were good rights out there, and we had a long right, about as old as anyone's out there.

Q. Would you state whether you had an agreement with Mr. Rubelt that he was to remain on the place?

A. Well, that first trip we were out there he said that he would like to stay on the place, and I told him that that would probably be all right with me.

Q. Was there anything said about the taxes and state land lease rentals, in connection with his staying on the place? A. No, sir.

Q. There was no relationship in your mind——?

A. (Interposing) No, sir.

Q. (Continuing) ——between his paying the taxes and the state land lease rentals, in connection with being permitted to stay on the place?

A. No, sir.

Q. So that the property that you leased was rented for \$3,000.00, less whatever the taxes and state land lease rentals might be?

A. Yes, sir.

Q. (By Mr. Greenfield): And that was the price that you intended to rent it for?

A. All I considered was that \$3,000.00 I had to

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

pay each year, sir, and I wasn't going to think about those other things until I had to pay them.

Q. Did you discuss this deal with your tax accountant, before you entered into it?

A. No, sir.

Q. Had you considered the tax liability that you might incur or not incur on a lease-option basis, when you decided that that's the way you wanted it?

A. I didn't consult anyone on it.

Q. Did you consider it in your own mind?

A. I don't understand taxes very well, sir.

Q. Was there any discussion ever had between Mr. Rubelt and you and your brother, or you and Mr. Hall, or any of you, regarding interest?

A. He was to charge me interest on the remaining \$7,000.00, I think.

Q. But the \$33,000 was interest-free?

A. Yes, sir.

Q. You think he understood it that way?

A. Yes, sir.

Q. In December of 1950, you and Mr. Rubelt amended the lease, do I understand?

A. Whatever that date is on there.

Q. I think that's the correct date. That was at your request?

A. Yes, sir.

Q. (By Mr. Greenfield): What was your object in doing that?

A. Well, drawing that lease up, I thought Mr. Hall favored Mr. Rubelt a little bit there, inasmuch as it only gave me thirty days to take that option

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

up in, and I thought that, forgetful as I am, I might forget to take up that option; or, in case I died, some of my family might forget to take that option up; and after paying that much money in on it, I certainly wanted to have the ranch there.

Q. Since taking over the ranch in April of 1950, what if anything have you done toward improving the place?

A. I improved the road quite a good deal. That road was almost impassable when I took it over. And I put in a culvert where it went over an old creek, where you might get stuck or might break it to pieces fording the creek. I throwed lots of rocks out of the road, and made it fairly passable. And I have put in a corral and a loading chute and branding chute, that cost me approximately a thousand dollars. I have done the house over a little bit, to make it a little more livable. I put a lining in the porch, and I put a sink in the house, so it would be a little bit more convenient for the people living there. And during the high water of the spring—1951?—the fellow that was staying out there called me up and said the water was going to wash the dam out, and I hurried out there with some dynamite, and borrowed a horse from the Flying H ranch and rode over there. Just before I got over there, however, the foreman from the Flying H ranch and my man had blown the spillway out. It was a rock spillway, with some boards in it; and Mr. Rubelt in his conversation before then told

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

me he had had to blast that out before, in case of high water, to keep the dam from going over. And they had blasted that out, and it took some of the cement out there. And just as soon as I could I took a lot of gravel out from here and repaired that; just as early as I could in the spring, I took a lot of gravel out from here and repaired it much better than it was, and fixed it so we could get those boards out in case of high water. He had them standing up like this (indicating), and the water was going over the top; and now I have them laying down like this (indicating), with a chain on every other of those; and now it's possible to pull those boards out without risking your life. And I have repaired that quite a little better than it was. And I have endeavored to keep the fences up as good or better than they was. And minor repairs around the corrals and small pens in around the ranch there.

Q. (By Mr. Greenfield): How much hay did you raise in 1950?

A. I didn't measure it, sir.

Q. How much hay did you raise in 1951?

A. I think I have raised about the same amount of hay every year out there, probably, with the exception of the year I blowed the spillway out and lost some of my hay. I think I didn't raise quite as much that year.

Q. How much hay did you raise in the years other than the one year you mention?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of D. O. Bybee.)

A. I think there is approximately two hundred tons of hay in there; I think there is approximately 250 tons, now. The hay can be measured out there now.

Q. Have you engaged in any new planting of hay?

A. Yes, we reseeded the upper meadow with new clover.

Q. (By Mr. Greenfield): How much land is involved in the reseeding?

A. I would have to talk with my men, but it had timothy in there, and I reseeded with clover. There might be thirty acres in there.

Q. Is there any area that has apparently grown hay in the past and is not growing hay now?

A. No, sir.

Q. Do you think it is possible to raise any more hay than you are now growing?

A. I think I have taken good care of that hay, and cut all except if you got down in the ditches and wanted to cut those tules and very rough hay.

Q. Do you think it would be possible to raise 400 tons of hay on the place?

A. Not now, unless you worked some of the old tight sod over and replanted. I have not replanted any down by the house; I think it's the original hay or original grass that grew there. I don't know.

Q. By breaking up some of the sod and reseeding it, it might be possible to raise 400 tons of hay on the place?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. It might be. It's not very level. You have to pond the water on some of the low land, to make it get up on the high.

Q. What, in your opinion, is the value of the place now?

A. Well, sir, I don't want to sell the place. I need it in my operations, and under the present condition I don't know what you could sell it for.

Q. To what extent do you think you have increased the value of it by the improvements you have made on it?

A. Just like I told you.

Q. (By Mr. Greenfield): How much money would that run to?

A. I don't know, sir; that would have to be someone else's job.

Q. Do you think it would run over \$2,000.00?

A. I think I have spent that much in fixing it up.

Q. The improvements you have made have a value——?

A. Maybe more than that. They worked quite extensively every year on the fences. I don't know how much, especially for the other years. I have kept a little better track, this year; since he complained about the way I kept things up, I have kept a little better track of it.

Q. Do you think the expenditures for improvements, as distinguished from ordinary maintenance, would exceed two or three thousand dollars?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. No, sir.

Q. At the time you entered into the agreement, in April of 1950, did you consider it then that you were entering into a contract of sale or a contract of lease?

A. I thought that I could decide that later, sir.
Mr. Greenfield: I think that's all.

Redirect Examination

Q. (By Mr. Anderson): Mr. Bybee, going back to the matter of your home and residence, as I understand it you maintain a home for your family over at Nyssa? A. Yes, sir.

Q. And there are schools at Nyssa where your children go to school? A. Yes, sir.

Q. (By Mr. Anderson): There is no school out in the vicinity of your ranch? A. No, sir.

Q. That's out near Riddle? A. Yes, sir.

Q. There's no school out there?

A. No, sir. There's a schoolhouse there, but since I have been there it has been closed.

Q. The nearest school is Mountain City, Nevada?

A. I don't know; it might be Owyhee, I don't know.

Q. Owyhee is the Indian Reservation?

A. Yes, sir.

Q. Owyhee is quite some distance from your ranch? A. Yes, sir.

Q. About how far is it?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

A. About thirty miles.

Q. How far is it from the Rubelt ranch to Mountain City?

A. I think forty miles, or something like that, to Mountain City, and probably twenty-five or something like that to Owyhee.

Q. In Nevada? A. Yes, sir.

Q. You maintain your home also at Riddle, at the Rubelt ranch? A. Yes, sir.

Q. And is that your official place of residence?

A. It's where I choose to stay as much as I can stay.

Mr. Greenfield: Let me object to that as calling for the conclusion of the witness.

Q. (By Mr. Anderson): Is that your official place of residence? A. Yes, sir.

Mr. Greenfield: Same objection.

Q. (By Mr. Anderson): That is your voting residence, isn't it? A. Yes, sir.

Q. You registered at Riddle to vote, in 1952?

A. Yes, sir.

Q. And you voted at Riddle in the general election in 1952? A. Yes, sir.

Q. You also have your ranch at Grandview, or near Grandview? A. Yes, sir.

Q. That's known as the Shoofly ranch?

A. Yes, sir.

Q. How large is that ranch?

A. Approximately four hundred acres of farming ground.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. That's approximately four hundred acres of irrigated crop land? A. Yes, sir.

Q. Your brother is interested with you in that, too? A. Yes, sir.

Q. That's W. A. Bybee? A. Yes, sir.

Q. Do you also have lands over in Malheur, Oregon? A. Yes, sir.

Q. Near Nyssa? A. Yes, sir.

Q. Irrigated lands? A. Yes, sir.

Q. (By Mr. Anderson): How much land do you have there?

A. I think approximately 350 or -75 acres there.

Q. Irrigated land there? A. Yes, sir.

Q. Who takes care of the farming operations at Nyssa?

A. That's my brother's responsibility.

Q. W. A. Bybee takes care of the ranch operations over in Malheur County? A. Yes, sir.

Q. Who takes care of the ranch operations at the Shoofly ranch?

A. That's my responsibility.

Q. That's near Grandview. A. Yes, sir.

Q. And whose responsibility is it to oversee the operations at the Rubelt ranch at Riddle?

A. That's mine.

Q. And has that been true during the last three years? A. Yes, sir.

Q. It was true in 1951? A. Yes, sir.

Q. And in 1952? A. Yes, sir.

Q. And throughout 1953? A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. You have taken care of the operations during all that time in Idaho, and your brother the operations in Oregon? A. Yes, sir.

Q. And when you are at the Riddle ranch, you live in the home there?

A. In one of the rooms, yes, sir.

Q. (By Mr. Anderson): You batch there, or eat there?

A. No, I eat with the family I have out there taking care of the ranch.

Q. And when you are at Grandview, where?

A. Well, I stop at the house there, many times, back and forth. There is an old house there by the river, and I batch some there.

Q. That's the old pump house?

A. Yes, sir.

Q. And you batch some there?

A. Yes, sir.

Q. That's mostly a way-station, going to and from Riddle? A. Yes, sir.

Q. I think the record isn't quite clear on your hunting and fishing licenses. You say you didn't buy a hunting and fishing license this year, 1953?

A. No, sir.

Q. Do you know whether or not you bought one in 1952—that's last year?

A. Gene, I have bought about two licenses since I came out here, and I don't know.

Q. Thirteen years ago? A. Yes, sir.

Q. Well, did you hunt in 1952?

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of D. O. Bybee.)

A. No, sir.

Q. If you bought a license in 1952, you don't recall it, I take it?

A. I don't know which year it was. I might have a record of it somewhere, I don't know. I have bought about two licenses.

Q. (By Mr. Anderson): That's two licenses in thirteen years? A. I think so.

Q. Now, Mr. Bybee, let's go back to the time when Mr. Rubelt and you first went to Mr. Hall's office, the first day you saw Mr. Rubelt and came in with him to Mountain Home. Had you ever seen Mr. Hall before that? A. No, sir.

Q. Did you know he existed, before that time?

A. No, sir.

Q. Had you ever heard of him?

A. No, sir.

Q. Did Mr. Rubelt appear to know him?

A. Yes, sir.

Q. Mr. Rubelt told you to go to that office with him, did he? A. Yes, sir.

Q. And you went there with Mr. Rubelt?

A. Yes, sir.

Q. You said Mr. Rubelt went over to the office. Did he get out of the car first?

A. Yes, sir.

Q. And go to open the door?

A. Yes, sir, and to my surprise he walked in.

Q. And you were in the car? A. Yes, sir.

Q. And your brother, W. A. Bybee, was in the

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

car with you? A. Yes, sir.

Q. (By Mr. Anderson): Did Mr. Rubelt appear to know Mr. Hall? A. Yes, sir.

Q. How were you able to tell?

A. Well, Mr. Hall called him by his first name, "Henry," all the time we were in there.

Q. You had never met or talked to Mr. Hall before then?

A. No, sir, I never knew he was alive, sir.

Q. And during all the time you were there that day, was Mr. Hall there with you?

A. Yes, sir.

Q. Let's go to a day or two later, when you and Mr. Rubelt were to meet and go to Mr. Hall's office. As I understand it, you agreed to meet at the Mellen Hotel? A. Yes, sir.

Q. At about one o'clock?

A. As I remember.

Q. And you testified, I believe, that you went to the Mellen Hotel and waited for Mr. Rubelt?

A. Yes, sir.

Q. And he didn't come? A. Yes, sir.

Q. And you went to Mr. Hall's office, and Mr. Rubelt was there? A. Yes, sir.

Mr. Greenfield: Just a minute, I object to a continuing line of leading questions which I don't think are proper on redirect examination.

Q. (By Mr. Anderson): What was Mr. Rubelt doing there?

A. I went into the office, and I asked the girl if

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Mr. Rubelt had shown up, and she said, "Yes, he is in there," and I opened the door and Mr. Rubelt was there with his back to me, and Mr. Hall with his face to me.

Q. And were they across the desk from each other? A. Yes, sir.

Q. And were they talking to each other?

A. Yes, sir.

Q. Do you know what they were talking about?

A. I think they were talking about this contract, sir, and this lease and option to purchase.

Q. And was it at that time that Mr. Hall explained the lease and option agreement, and explained it section by section?

A. Yes, sir, before we got out of there. I don't know as he started right in, but he had the instrument prepared, and he set on this side and Mr. Rubelt and I sat on that side, and he read it very slowly and very cautiously, and explained all of it.

Q. And do you know whether Mr. Rubelt listened very intently? A. Yes, he did.

Q. And did he ask questions?

A. Yes, I think there was some questions brought up.

Q. And was Mr. Rubelt present there that day all of the time you were in Mr. Hall's office?

A. Yes, sir.

Q. That was when the initial lease and option agreement was signed? A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. (By Mr. Anderson): By Mr. Rubelt and yourself?

A. Yes, sir. My brother, Mr. W. A., wasn't there.

Q. He signed later, in Nyssa, Oregon?

A. Yes, sir.

Q. Were those contracts distributed, do you remember? That is, among the parties?

A. He gave me one, and he gave Mr. Rubelt one, and he kept one—I don't know whether he had any more copies or not. I know I made a copy of it for the Taylor Grazing, and then I think I took the original down to Owyhee County and had it recorded.

Q. What was your opinion of the value of that Rubelt ranch and spread, at the time you dealt for it?

A. Well, it was quite remote out there—

Q. (Interposing) What was your opinion of the value of it?

A. I thought it was worth twenty-five or thirty thousand dollars.

Mr. Anderson: That's all.

Recross Examination Under the Statute

Q. (By Mr. Greenfield): You thought it was worth twenty-five or thirty thousand dollars, cash?

A. I didn't have twenty-five or thirty thousand dollars, cash, sir. He just asked me what I thought it was worth, and I just answered him like that.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Q. But your statement of twenty-five or thirty thousand dollars is your best estimate of what the place would have been worth? A. Yes, sir.

Q. For cash? A. Yes, sir.

Q. (By Mr. Greenfield): To a man that had cash? A. Yes, sir.

Q. And that was your opinion at that time?

A. Yes, sir.

Q. Now, on the first occasion when you were in Mr. Hall's office, were you the one who told Mr. Hall what to put in the agreement, principally?

A. We sat down around the table, just like this, and I would tell him my idea, and Mr. Rubelt would tell him his idea of how the instrument should be written.

Q. Who did most of the talking?

A. Sir, I wouldn't know.

Q. See if you can remember. Think.

A. Well, we were both there to draw up an agreement, and Mr. Rubelt did part of the agreement and I did part of the agreement. My brother didn't do so much talking.

Q. Mr. Bybee, in the event you want to buy a duck-hunting license for Oregon this fall, will you feel obliged to pay an out-of-state fee to purchase it?

Mr. Anderson: We object to that on the ground it is argumentative and hypothetical.

A. Sir, I have never hunted ducks in my life, so I am certain I will not apply for one.

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

Mr. Greenfield: That's all.

(Witness excused.)

Reporter's Certificate

I, Frank J. Kester, hereby Certify:

That I attended the hearing in the above entitled matter and correctly reported in shorthand the evidence and proceedings taken and had in said hearing; that the above and foregoing is a full, true, and correct transcript of my shorthand notes taken at said hearing, and is a full, true, and correct record of the evidence given and proceedings had thereat.

/s/ FRANK J. KESTER,

Certified Shorthand Reporter, 1201 N. 6th Street,
Boise, Idaho.

State of Idaho,

County of Ada—ss.

I, Frank J. Kester, a Notary Public in and for the State of Idaho, do hereby Certify:

That the above named D. O. Bybee, the witness aforesaid, was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the deposition by him deposed was reduced to writing by myself; that George A. Greenfield and Laurence N. Smith, Attorneys-at-Law, appeared as counsel for the plaintiff, and Eugene H. Anderson and Samuel Kaufman, Jr., Attorneys-at-Law, appeared as coun-

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of D. O. Bybee.)

sel for the defendants; that said deposition was taken on Monday, 21, September 1953, between the hours of 2:00 p.m. and 3:30 p.m. of said day, pursuant to oral stipulation contained herein, at the law office of George A. Greenfield, Suite 312, Continental Bank Building, Boise, Ada County, State of Idaho; that I am not attorney for any of the parties hereto or otherwise interested in the event of said action; that no exhibits were marked or offered in evidence thereat.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 2d day of October, 1953.

[Seal] /s/ FRANK J. KESTER,
Notary Public for Idaho, Residing at Boise, Idaho.

[Endorsed]: Filed October 2, 1953.

[Endorsed]: No. 14777. United States Court of Appeals for the Ninth Circuit. Henry E. Rubelt, by Raymond Edward Ashby, his grandson and next friend, Appellant, vs. D. O. Bybee and W. A. Bybee, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: May 27, 1955.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14777

HENRY E. RUBELT, by Raymond Edward Ash-
by, his grandson and next friend,

Appellant,

vs.

D. O. BYBEE and W. A. BYBEE,

Appellees.

STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of the above entitled court, appellant does hereby make the following statement of points upon which he intends to rely on appeal:

1. The Court erred in granting Defendants' Motion to Dismiss the action.

2. The Court erred in making Findings of Fact Nos. I, IV and V, and such Findings of Fact are against the weight of the evidence and are clearly erroneous.

3. The Court erred in making Conclusions of Law Nos. I and II.

4. The Court erred in failing to find, upon all the evidence, that Plaintiff was entitled to cancellation of the lease and option instruments as a matter of law.

5. The Court erred in failing to find, upon all the evidence, that Plaintiff had established the

diversity of citizenship of the parties, requisite to federal jurisdiction.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By GEORGE A. GREENFIELD,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 6, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant in the above entitled cause and pursuant to Rule 17(6) of this Court hereby designates the following as the record to be printed on appeal:

1. The entire Reporter's Transcript of all testimony.
2. The Complaint.
3. The Answer.
4. Deposition of defendant, D. O. Bybee, admitted in evidence.
5. Findings of Fact and Conclusions of Law.
6. Judgment of Dismissal.
7. Notice of Appeal.

8. Statement of Points Upon Which Appellant Intends to Rely on Appeal.

9. Designation of Contents of Record on Appeal.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By GEORGE A. GREENFIELD,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 6, 1955. Paul P. O'Brien,
Clerk.

